JUDICIARY COMMITTEE

MEETING PACKET

Wednesday, December 7, 2005
9:15 a.m. – 11:00 a.m.
Morris Hall
(17 HOB)

Allan G. Bense
Speaker

David Simmons
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

(AMENDED 12/6/2005 2:38:11PM)

Amended(1)

Judiciary Committee

Start Date and Time:	Wednesday, December 07, 2005 09:15 am
End Date and Time:	Wednesday, December 07, 2005 11:00 am
Location:	Morris Hall (17 HOB)
Duration:	1.75 hrs

Workshop on sexual predator residency and movement restrictions

NOTICE FINALIZED on 12/06/2005 14:38 by Williams.Tanesha

Florida House of Representatives

Judiciary Committee

Allan G. Bense
Speaker

David Simmons
Chair

COMMITTEE ON JUDICIARY

Morris Hall (17 HOB)
December 7, 2005
9:15 a.m. – 11:00 a.m.

Agenda

1. **Call to order**

2. **Roll call**

3. **Welcome and opening remarks**

   Representative David Simmons, Chair

4. **Workshop on sexual predator residency and movement restrictions**

   a. Presentation and discussion of report entitled "Predators and the Use of Residency Restrictions to Control Recidivism" (Includes actions taken by local governments, research findings regarding recidivism, and case law analysis) (9:15 a.m.—9:45 a.m.) [Tab "A"]

   Paul Gougelman, City Attorney, City of Melbourne

   b. Organizational framework of the legal status of sexual offenders and/predators (9:45 a.m.—9:55 a.m.) [Tab "B"]

   Mary Coffee, Department of Law Enforcement

   c. The basics of community supervision and monitoring (9:55 a.m.—10:10 a.m.) [Tab "C"]

   Beth Atchison, Department of Corrections

   d. Presentation of data requested by Chair concerning the statewide distribution of offenders and predators, the geographical impact of residency restrictions, and the utilization of electronic monitoring for sex offenders and predators (10:10 a.m.—10:55 a.m.) [Tab "D"]

   Richard Dolan, OPPAGA
   Michelle Harrison, OPPAGA

5. Closing remarks

Representative David Simmons, Chair

6. Adjourn

TAB INDEX

A

SEXUAL PREDATORS AND THE USE OF RESIDENCY RESTRICTIONS TO CONTROL RECIDIVISM

City of Melbourne City Attorney's Office
Paul R. Gougelman, City Attorney

August 17, 2005

CONTENTS

EXECUTIVE SUMMARY

The Melbourne City Council has asked whether it is possible to legislate residency requirements for sexual predators. This report evaluates the legality of residency restriction proposals and the evidentiary support for such ordinances. The report also evaluates what action other cities and states have taken to date given that many Florida cities and 14 states have decided to adopt residency requirements.

This paper discusses the differences between sexual predators and sexual offenders, recognizing that the definition is different in each state depending upon action taken by the state's legislature. In Florida, a sexual offender is someone who has committed some type of sexually-oriented crime with a minor or an elderly person wno doesn't have the mental ability to consent. A sexual predator is one who is a repeat sexual offender, sexual offender who uses physical violence, or a sexual offender who preys on children and is declared to be a sexual predator by a court of law.

Florida currently has a statute applicable to predators convicted after October 1, 1995, that as a condition of release from prison, sexual predators have a curfew (10 p.m. to 6 a.m.) and sexual predators are not permitted to live within 1,000 feet of a school, day care facility, park, playground, designated public school bus stop, or other place where children congregate. 13 other states have adopted similar laws setting the residency restriction anywhere between 500 feet and 2,500 feet.

In the Spring of 2005, many Florida cities have concluded that the 1,000 foot residential restriction around schools, parks, etc., is simply not enough of a buffer. Following the lead of the City of Miami Beach, at least 40 or more municipalities have adopted or are considering adopting residential restrictions of up to 2,500 feet. To date in Brevard County only the City of Cocoa is considering whether to adopt enhanced residency restrictions for sexual predators. Palm Bay is considering work-related restrictions for predators.

There are apparently two reasons for adoption of residential restrictions, including: (1) making citizens feel more secure by not allowing predators to live in neighborhoods where there are schools, playgrounds, and day care centers; and (2) seeking to reduce the chance of sexual molestation of minors and reducing the rate of recidivism among sexual predators. There are really no reports or studies with regard to the first issue. There are few reports with regard to the second issue, although most of the reports completed, one of which is a 2005 report conducted in Florida, give some reason to believe that residential restrictions might actually increase the rate of recidivism among sexual predators.

With regard to litigation relating to sexual predators and residential restrictions, there are few cases. In Florida, the U.S. Court of Appeals for the 11th Circuit, has declared constitutional a Florida's statute which requires sexual offenders and predators, post-release from jail, to register periodically with the State of Florida, to register whenever they

move, to periodically submit DNA samples and fingerprints, to be photographed, and to be listed on an internet web-site as sexual offenders or sexual predators. *See* Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005). Likewise, the Florida Supreme Court, in a separate case, Milks v. State, 894 So.2d 924 (Fla. 2005), has also recently declared the Florida Sexual Predators Act to be constitutional.

With regard to the legality and constitutionality of residential restrictions, few cases have addressed this issue. The leading case in the nation is Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), *rehearing en banc denied,* (June 30, 2005). In Miller the 8th Circuit U.S. Court of Appeals declared as constitutional an Iowa statute that provides residential restrictions of 2,000 feet from any school or child care facility for certain sexual offenders. The case involved multiple claims of unconstitutionality.

Likewise, the Iowa Supreme Court in State v. Seering, ___ N.W.2d ___, 2005 WL 1790924 (Iowa July 29, 2005), the Court confronted additional claims of unconstitutionality of the state's 2,000 foot residential restrictions. The Court found that statute constitutional.

The final issue examined by the paper is what effect the residential restrictions would have in Melbourne. Six maps are submitted review. Two each of the maps examine the areas restricted for residence 1,000 feet, 2,000 feet, and 2,500 feet, respectively, from schools, day care facilities, and parks.

REPORT

The Melbourne City Council has asked whether it is possible to legislate residency requirements for sexual predators. This report evaluates the legality of residency restriction proposals and the evidentiary support for such ordinances. The report also evaluates what action other cities and states have taken to date given that many Florida cities and 14 states have decided to adopt residency requirements.[1]

I. SEXUAL PREDATORS VERSUS SEXUAL OFFENDERS: To begin the analysis it is helpful to note that there is a difference between what the law refers to as "sexual offenders" and "sexual predators."

A. What is the difference between a sex offender and a sexual predator? The difference between a sexual predator and a sexual offender is somewhat different in each state, because it is predicated on the law of the state regulating it. While the definition is somewhat awkward, a "sexual offender"[2] pursuant to Florida law is someone who has been convicted of committing or attempting to commit kidnapping of a minor, falsely imprisoning a minor, or luring and enticing a child into a structure to commit an illegal offense; sexual battery upon a minor; the selling of minors for prostitution; lewd or lascivious acts upon someone under 16 years of age; lewd or lascivious acts upon an elderly person who does not have the capacity to consent; employing someone under 18 to engage in a sexual performance; or the showing of sexual material to a minor.

The offender has to have been released after September 30, 1997 from probation, jail, or community control, for one of the foregoing offenses. If the sex offender was convicted in another state and moves to Florida, he or she has to have been designated as a sex offender or a sexual predator in the other state.

On the other hand, a "sexual predator"[3] is someone who has been convicted of committing or attempting to commit one of the crimes listed above after October 1, 1993, has not been pardoned, and has been designated by a court as a "sexual predator." *In essence a sexual predator is one who is a repeat sexual offender, sexual offender who uses physical violence, or a sexual offender who preys on children.*[4] The Legislature has made a finding that such individuals are sexual predators and that they present an extreme

---

1 LA Times News Service, Sex offender laws popular, Section B10 (July 7, 2005).

2 *See* §§943.0435 and 944.607, Fla.Stat. (2004).

3 *See* §775.21, Fla.Stat. (2004). In some cases, a "sexual predator" is someone who has been civilly committed for committing a sexually violent crime.

4 §775.21(3), Fla.Stat. (2004).

6

threat to the public safety.

B. What type of post-release (from jail) registration is required of Sex Offenders and Sexual Predators? "Sexual offenders" are required to report to the Sheriff's Office or to the Department of Corrections within 48 hours after establishing a temporary or permanent residence.[5] Likewise, when a sexual offender vacates his residence, he must notify the Sheriff's Office and advise the Sheriff of the location to which he is planning to move.[6]

Sex offenders are required to have their photographs and fingerprints taken, to disclose their residency address, place of employment, description of the crime they were convicted of committing, name, social security number, *etc.* Within 48 hours of registering with the Sheriff or the Department of Corrections, the sexual offender must register with the Department of Highway Safety and Motor Vehicles and undertake the same process.[7]

Sexual predators must also register their residence and job in much the same manner as sexual offenders, except that all registration is handled by the Florida Department of Law Enforcement ("FDLE") and the Department of Highway Safety and Motor Vehicles (local driver's license office).[8] Law enforcement agencies are required to inform the community and the public of the presence of a sexual predator.[9]

Pursuant to the Jessica Lunsford Act,[10] which was recently adopted by the Florida Legislature, the law has been further tightened. Upon release from prison, sexual offenders and predators must report in person to the local sheriff's office every six (6) months to update their registration.[11] If the predator or offender is attending or working at an institution of higher learning in this state, that information must be disclosed as a part of any registration update.[12] Failure to register is a third degree felony, punishable by up to five (5) years imprisonment and/or up to a $5,000 fine.[13]

---

5 §943.0435(2), Fla.Stat. (2004).

6 §943.0435(7)and (8), Fla.Stat. (2004).

7 §943.0435(3), Fla.Stat. (2004).

8 §775.21(6), Fla.Stat. (2004).

9 §775.21(7), Fla.Stat. (2004).

10 Chap. 2005-28, Laws of Fla.

11 §§7 and 9, Chap. 2005-28, Laws of Fla.; §§775.21(8)(a) and 943.0435(14)(a), Fla.Stat. (2005).

12 Id.; §943.0435(14)(a)2., Fla.Stat. (2005).

13 §§775.082(3)(d) and 775.083(1)(c), Fla.Stat. (2004).

When the Sheriff or Chief of Police learns of the permanent or temporary residence of a sexual predator in the community, the Sheriff or Chief is required to notify the public in a manner that he deems appropriate and within 48 hours shall notify each licensed day care center and each elementary, middle and high school located within one mile of the predator's residence. In Melbourne, notices and flyers are actually handed out to businesses and residents within a one mile radius of the predator's residence.[14]

In addition, any sexual predator who is 18 years old or older and who commits sexual battery; lewd or lascivious molestation, conduct, or battery; uses a child in a sexual performance, or sells a minor for the purpose of a sexual performance, with a child 15 years of age or younger after September 1, 2005, will be required to wear an electronic monitoring device so that the predator's whereabouts can be tracked at all times.[15]

II. FLORIDA CONDITIONAL RELEASE PROGRAM FOR SEXUAL PREDATORS: If a sexual predator has committed on or after October 1, 1995, a sexual battery; lewd or lascivious molestation; uses a child in a sexual performance, or sells a minor for the purpose of a sexual performance, and is designated by the court as a "sexual predator," the following are conditions of the predator's release:

- Mandatory curfew from 10 p.m. to 6 a.m.;
- If the victim was under the age of 18, there is a prohibition on living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate;
- Active participation in and successful completion of a sex offender rehabilitation program with therapists specially trained to treat sex offenders at the releasee's own expense;
- Prohibition on contact with the victim, directly or indirectly through a third person;
- If the victim was under 18 years of age, a prohibition against contact with children under the age of 18 until certain conditions have been satisfied;
- If the victim was under 18 years of age, a prohibition on working for pay or as a volunteer at any school

Thus, Florida law requires that sexual predators convicted after October 1, 1995 and whose victims were under the age of 18, may not reside within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where

---

14 Telephone conversation with Commander Jim Gibbens, July 6, 2005; *see also* Melbourne Police Dept. General Order R. 1721.

15 §12, Chap. 2005-28, Laws of Fla.; §947.1405(10), Fla.Stat. (2005).

8

children regularly congregate.[16] Attached to this report are the first and second maps that show what the 1,000 foot residency restriction buffer from day care centers, schools, and parks looks like in Melbourne.[17] Review of the map shows that aside from the airport and Indian River Lagoon, both of which are uninhabitable, a substantial portion of the City is off limits to sexual predators for residential purposes.

III. RESIDENCY RESTRICTIONS IN OTHER STATES FOR SEX OFFENDERS AND SEXUAL PREDATORS: Fourteen (14) states have adopted varying types of residency restrictions,[18] including Florida,[19] Alabama,[20] Arkansas,[21] California,[22] Georgia,[23] Illinois,[24] Indiana,[25] Iowa,[26] Kentucky,[27] Louisiana, Ohio,[28] Oklahoma,[29] Oregon,[30] and Tennessee.[31]

---

16 Other states have enacted similar laws. For example, in Arkansas and Iowa no sex offender is permitted to reside within 2,000 feet of a public or private elementary school or secondary school or day care facility. See §5-14-128(a), Ark.Stat.; Iowa Code §692A.2A.

17 Mapping the location of school bus stops would be extremely difficult, time and labor consuming based on the way the information is furnished from the School Board, according to City of Melbourne GIS Technicians.

18 Levenson, Jill S. and Cotter, Leo P., The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd? 49 International J. of Offender Therapy and Comparative Criminology pp. 168 at 168 (2005) (hereinafter: "Levenson & Cotter").

19 *See* Note 16, *supra*.

20 No adult criminal sex offender shall establish a residence or accept employment within 2,000 feet of the property on which any school or child care facility is located. §15-20-26(a), Ala. Code. Alabama is an anomaly. Alabama's Legislature originally set a 1,000 foot proximity restriction from schools. This was changed to a 2,000 foot restriction effective August 1, 2000. *See* Act 2000-728, p. 1566, §1, Laws of Ala.

21 Certain sex offenders are prohibited from residing within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located. §5-14-128(a), Ark. Code.

22 Sex offenders prohibited from residing within one-quarter (1/4) mile of the property on which any public or private school is located. §3003(g), Cal. Penal Code.

23 No registered sex offender shall reside within 1,000 feet of any child care facility, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, school, or area where minors congregate at their closest points. §42-1-13(b), Ga. Code.

24 It is unlawful for a *child* sex offender to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend. The foregoing does not prohibit a child sex offender from residing within 500 feet of a school building or the real property comprising any school that persons under 18 attend if the property is owned by the child sex offender and was purchased before the effective date of this law. 720 Ill. Comp. Stat. §5/11-9.3(b-5).

25 §35-38-2-2.3, Ind. Code.

Gov. Jennifer Granholm (D-Michigan) has proposed that state lawmakers set up a 1,000 foot "predator-free zone" around schools.[32] Notwithstanding the issuance of the Colorado Office of Domestic Violence and Sex Offender Management *Report*, the Colorado Legislature is also considering adopting such a law.[33] The political will of the public is so strong that in Loveland, Colorado, residents offered to pay $405,000 to a sexual predator to move from their neighborhood.[34]

---

26 A sex offender shall not reside within 2,000 feet of a public or nonpublic elementary or secondary school or a child care facility. §692A.2A 2., Iowa Code.

27 No sex offender who is placed on any form of supervised release shall reside within 1,000 feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence. This section does not apply to a youthful offender probated or paroled during his or her minority or while enrolled in a secondary education program. §17.495, Ky.Rev.Stat.

28 No person who has been convicted of a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within 1,000 feet of any school premises. §2950.031(A), Ohio Rev. Code.

29 It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution. 57 Okla.Stat. §590.

30 The statute provides that offenders shall have a general prohibition against allowing them to reside near locations where children are the primary occupants or users. The condition of parole or post-release supervision shall be developed by the Department of Corrections. §144.642(1)(A), Ore.Rev.Stat.

31 No sexual offender shall knowingly reside or work within one thousand feet (1,000) of any public school, private or parochial school, licensed day care center, or any other child care facility or of the home of the offender's former victims, or the victims' immediate family members or within one hundred feet (100) of any of the offender's former victims. §40-39-211(a), Tenn. Code.

32 See Hill, Michael, Worried about "psycho-social" stress for sex offenders? Neither are we, Community Watch (Assoc. Press June 20, 2005).

33 Mitchell, Kirk, Colorado's Romanoff calls for review of sexual predators - Sex-predator review in the works, Denver Post (May 31, 2005). House Speaker Andrew Romanoff said Monday he plans to investigate whether new legislation is needed to strengthen Colorado's procedures for identifying violent sexual predators. Romanoff, a Denver Democrat, said he will meet with police, district attorneys and with state corrections, probation and Justice Division officials this week to explore why Colorado has identified only two sexually violent predators living in its communities in six years. "This is not like repeat burglary," Romanoff said Monday. "A single incident can mar someone for life."

34 Steiner, Jennifer, Neighbors Discuss Paying Sexual Predator To Move, Channel 9 (Mar. 23, 2005). Some residents of Loveland are so concerned about a sexual predator in their neighborhood, they are willing to pay him to move out. The plan -- which is still in the discussion stages -- wouldn't be cheap. Some residents at the Fairways at O'Bannon Creek, off Route 48, want to pay the man $18,000 to $20,000 more than the $385,000 he paid for the home. According to those neighbors, the man has agreed to the price of $405,000, but no decision has been made on the deal at this point. The residents started talking about the idea after receiving a postcard in the mail from the Clermont County Sheriff's

10

IV. ACTIONS TAKEN BY MIAMI BEACH AND OTHER FLORIDA CITIES WITH REGARD TO RESIDENCY RESTRICTIONS FOR SEXUAL PREDATORS:

A. Miami Beach: On June 8, 2005, the City of Miami Beach adopted its ordinance regulating the residency of sexual predators.[35] At the suggestion of Mayor David Dermer, who called the 1,000 foot buffer "not far enough",[36] the City of Miami Beach's ordinance expanded the buffer to 2,500 feet. Pursuant to Miami Beach's ordinance, no sexual predator whose offense involved a child of under 16 shall reside within 2,500 feet of a school, designated school bus stop, day care center, park, playground, or other location where children regularly congregate. The penalty for such a violation is a $500 fine and/or up to 60 days in jail.[37] This was the beginning of a movement by many Florida municipalities to regulate the residency of sexual predators,[38] many of which are located in

---

Department last month, which stated the man is a "level three sexual predator" who had been convicted of sexual assault in Colorado. "At first, morally and ethically I thought it was wrong," said Sally Hoffman, who lives three houses away from the man. "But after my husband and I discussed it, we looked at it just for the safety of my family,' she said. Hoffman is trying to get 100 families to give $200 each, to cover the cost. Neighbors held a meeting Tuesday night to discuss the issue, but no decision was reached. The man in question is listed in the Clermont County sexual offender registry.

35 *See* Ord. No. 2005-3485, City of Miami Beach, Fla. (adopted June 8, 2005).

36 Miami Sunpost, front page (Apr. 18, 2005).

37 Pursuant to Florida law, the maximum penalty that can be attached to the violation of a municipal ordinance is $500 and/or 60 days in jail. Most municipal ordinances provide that each day of violation of the ordinance is considered to be a separate penalty. That is the case in the City of Melbourne. §1-10, Melbourne City Code. The violation has to be witnessed by a law enforcement officer. *See* §162.22, Fla.Stat. (2004).

38 Since the time of Mayor Dermer's original call to tighten residency restrictions for sexual predators, a number of the Florida cities have taken action, including but not limited to Boca Raton (pop. 80,000) Ordinance No. 4880 (adopted June 28, 2005), 1,500 foot buffer from schools, day care centers, parks; Mount Dora (pop. 10,758) Ordinance No. 878 (adopted July 5, 2005), 2,500 foot buffer from schools, day care centers, parks, and playgrounds; Davie (pop. 90,000) Ordinance No. 2005-10 (adopted May 18, 2005), 2,500 foot buffer from schools, public school bus stops, day care centers, parks or playgrounds and other area where children congregate; Dania Beach (pop. 28,000) Ordinance No. 2005-023 (June 28, 2005), 2,500 foot buffer from schools, day care centers, and public parks; Pembroke Pines (pop. 151,000) Ordinance No. 2005-11 (adopted June 8, 2005), 2,500 foot buffer from schools, public school bus stops, day care centers, parks, playgrounds, and places where children normally congregate; Aventura (pop. 28,000) Ordinance No. 2005-11 (adopted July 21, 2005), 2,500 foot buffer from schools, day care centers, public parks, and playgrounds; Groveland (pop. 4,249), Ordinance No. 2005-06-18 (adopted July 5, 2005), 2,500 foot buffer from schools, day care centers, and parks; Miramar (pop. 103,000) Ordinance No. 1398 (pending adoption Aug. 17, 2005), 2,500 foot buffer from schools, day care centers, and parks or playgrounds; Orange City (pop. 8,000) Ordinance No. 252 (adopted July 26, 2005) 2,500 foot buffer from schools, day care centers, , churches, libraries, recreational open space, parks, and playgrounds; Oviedo (pop. 30,000) Ordinance No. 1310 (adopted June 6, 2005), 2,500 foot buffer from schools, day care centers, public parks, playgrounds and recreational open spaces; Jacksonville (pop. 800,000) Ordinance No. 2005-629-E (adopted May 24, 2005), 2,500 foot buffer from schools, public library, day care centers, parks, playgrounds or other areas where children regularly congregate; Weston (pop. 61,000) Ordinance No. 2005-08 (adopted July 5, 2005), 2,500 foot buffer from

South Florida.[39] Many East Central Florida local governments have begun to look at the issue. For example, Osceola County, St. Cloud, and Kissimmee officials are researching the law.[40] In Seminole County, Oviedo has adopted residency restrictions, and the police chiefs of all Seminole County municipalities have been meeting to consider tougher rules to restrict where offenders can live. The police chiefs are considering whether Oviedo's ordinance should be a model for other Seminole County municipalities.[41]

B. Dania Beach: Most of the residency restrictive ordinances adopted require that predators not be permitted to live within 2,000 or 2,500 feet of a school, playground, day care center, a library, or "places where children congregate." The term "places where children congregate" seems to be potentially void for vagueness and likely difficult to enforce. During the City Commission discussion regarding adoption of residency restrictions, commissioners noted that point and decided to delete the term from the City's ordinance.[42]

The Dania Beach City Commission was on the right track. In examining Indiana's sex offender residency restrictions law, the Indiana court of appeals found that a condition of probation that prevented convicted child molesters from residing within two blocks of any "area where children congregate" was void for vagueness. The court noted that the condition should have covered only specific places such as school yards, playgrounds and locations where children can be expected to congregate as a usual occurrence.[43]

---

schools, day care centers, parks or playgrounds, and public school bus stops; and City of Pompano Beach (pop. 87,000) Ordinance No. 205-66 (adopted July 12, 2005) 2,500 foot buffer from schools, day care centers, parks, public school bus stops, and places where children congregate; and Winter Park (pop. 26,860) Ordinance No. 2638-05 (adopted July 25, 2005), 2,500 foot buffer from schools, day care centers, parks or playgrounds, among others. Mayor Jim Naugle, City of Fort Lauderdale, recently stated that Ft. Lauderdale would probably have to adopt this type of ordinance simply because surrounding cities were all adopting the ordinance, if only to make sure Ft. Lauderdale is not seen as a "welcome destination" for predators. Olmeda, Rafael A., Report on Sexual Offenders Results in Forum, Sun-Sentinel (July 17, 2005). The City of Cocoa is examining the issue. Conversation with Cocoa City Attorney Anthony Garganese, Wed., Aug. 10, 2005.

39 The reason that many South Florida municipalities have adopted a sexual predator ordinance is due to lobbying by Ron Book, a legislative lobbyist in Tallahassee, who lives in Broward County. Book's daughter was the victim of a sexual predator, and she and her father have actively courted South Florida municipalities in an effort to have the proposal adopted. *See, e.g.,* Item 7.7, City of Dania Beach City Council Minutes, pp. 7-8 (June 14, 2005).

40 Holland, Jason, Governments look at restrictions for sex offenders, Osceola News-Gazette (July 1, 2005).

41 WESH Channel 2, Seminole County Considers 'Oviedo Ordinance", www.wesh.com/news/4631842/detail.html(June 21, 2005).

42 *See* Moskovitz, Diana, Dania OK's Sex-Criminal Law, Miami Herald, p.5B (June 29, 2005); Ord. 2005-023 adoption, City of Dania Beach City Council Minutes (June 28, 2005).

43 Carswell v. State, 721 NE2d 1255 (Ind.App. 1999).

C. Daytona Beach Shores: Most of the residency restrictive ordinances adopted require that predators not be permitted to live within 2,000 or 2,500 feet of a school, playground, day care center, a library, or "places where children congregate." In Daytona Beach Shores, the City Council dealt with this issue in a different manner. They noted that children regularly congregate at the beach and adopted an ordinance which requires that predators not live within 2,500 feet of the beach.[44]

D. Lighthouse Point: Lighthouse Point, a wealthy community of 11,000 sandwiched between Pompano Beach and Deerfield Beach, decided to consider adopting a sexual predator ordinance. The ordinance provided that predators not be permitted to live within 2,500 feet of a school, playground, day care center, a library, or a private or public recreational facility where children normally congregate.[45] Prior to first reading it was discovered that there would be no places in the city in which a predator could reside, since every residential location in the City is within 2,500 feet of a school, playground, day care center, a library, or a private or public recreational facility where children normally congregate.[46] This raises the obvious question, 'what if every jurisdiction adopted one of these ordinances and predators couldn't live anywhere.'[47]

E. Palm Bay: Palm Bay looked at the possibility of adopting an ordinance similar to what most other cities have adopted. The City rejected this approach and instead has examined whether to adopt an ordinance regulating sexual offenders, providing that it is unlawful for any business owner or employer to allow a sexual predator to enter into or upon any residence, school bus stop, school, library, park, after-care center, or other place where children normally congregate, to make deliveries or perform labor or services without providing someone to accompany and monitor the activities of the sexual offender. The ordinance is attached for your review. The ordinance was adopted on first reading on July

---

44 Ord. 2005-15, City of Daytona Beach Shores, Fla. (adopted July 27, 2005); see Griggs, Melissa, City hopes to keep sexual offenders away from beach, Daytona Beach News-Journal (July 19, 2005) attached as an exhibit.

45 No ordinance number has been assigned as yet. The ordinance was adopted on first reading on July 26, 2005 and second reading and adoption should occur on August 9, 2005.

46 *See* Bryan, Susannah, Lighthouse Point ordinance would ban sex offenders from city altogether, South Florida Sun-Sentinel (July 26, 2005).

47 This issue was not one which received significant discussion during the first reading and discussion of the ordinance. Lighthouse Point City Attorney Michael Cirullo was asked if this issue posed a problem, and he advised the Commission that many other smaller communities had a similar problem. Conversation with City Clerk Carol Landau, August 1, 2005. *See also* Note 114, *infra*, (discussion in Doe v. Miller, a U.S. 8th Circuit Court of Appeals opinion involving Iowa's sexual predator residency restrictions, that found a similar problem in Iowa; Iowa statute was declared constitutional).

21, 2005,[48] and it is expected that there will be a further major revision. It will not return to the City Council for second reading until September 15, 2005.[49]

V. REPORTS REGARDING THE EFFECTIVENESS OF RESIDENCY RESTRICTIONS FOR SEXUAL PREDATORS: To date only a handful of reports have reviewed the effectiveness of residency restrictions. There has been comparatively little study of whether residential restrictions actually work for the two intended purposes of keeping sexual predators away from children and avoiding the opportunity for recidivism. It appears that the reports provide a "spotty" review of whether residency restrictions help reduce the rate of, or avoid, recidivism. Notwithstanding that point, there is some evidence to suggest that the recidivism rate is higher among child molesters than other types of criminals. As pointed out in some of these reports, there is also some evidence to suggest that residency restrictions may actually increase the rate of recidivism.

A. Rate of Recidivism Among Sexual Predators is Higher. From the handful of reports and studies, we do know that there is conflicting information on whether there is a high rate of recidivism among predators. For example, one study has concluded that individuals convicted of offenses involving unlawful sexual behavior have a high likelihood of recidivism.[50] In an analysis by two researchers, R.K. Hanson and M.T. Bussiere, in 1998, it was concluded that recidivism among rapists is 18.9% and among child molesters is 12.7% over a four to five year period.[51]

However, in a 1994 U.S. Department of Justice study, the researchers tracked 9,691 male sex offenders, including 4,295 child molesters for a three (3) year period after their release from prisons in 15 states. It was determined that only 5.3% of the sex offenders were rearrested for another sex crime. While this rate is much less than ascertained by the 1998 Hanson and Bussiere study, it still produces numbers showing that sex offenders released from state prisons are four (4) times more likely than non-sex offenders released from state prison to be rearrested for a sex crime.[52] Furthermore, released child molesters

---

48 Ord. No. 2005-33, City of Palm Bay, Fl.

49 *See* Jump, Linda, Sexual predators, Florida Today Sec. B01 (July 22, 2005).

50 Studies have demonstrated that individuals convicted of offenses involving unlawful sexual behavior have a high likelihood of recidivism. Office of Domestic Violence and Sex Offender Management, Report on Safety Issues Raised By Living Arrangements for and Location of Sex Offenders in the Community, at 7-8 (March 15, 2004)(hereinafter: the "*Report*").

51 *See* Hanson, R.K. & Bussiere, M.T., Predicting Relapse: A meta-mnalysis of sexual offender recidivism studies, Journal of Consulting and Clinical Psychology, 66, 348-362 (1998).

52 Office of Justice Programs, Recidivism of Sex Offenders Released from Prison in 1994, at 1 (rev. Nov. 2003)[hereinafter: "*Recidivism of Sex Offenders*"]. The rate of 262,420 non-sex offenders was lower at 1.3%. Id.

with more than one (1) prior arrest for child molestation were more likely to be rearrested for child molestation (7.3%) than released child molesters with no prior arrests.[53]

B. *2001 Justice Research Report.* Despite the publicity surrounding several high-profile sex offender incidents in the 1990s, relatively little research has been done on sex offenders themselves. In 2001, the Justice Research and Statistic Association, a Washington think tank, examined sexual offenders in one county in Arkansas.[54] This study examined sex offenders in one Arkansas county who had children as victims. Specifically examined was the relationship between where the offenders live and where children congregate to see whether offenders choose to reside in areas with high concentrations of children.

The key conclusion reached in the report is that 48% of child molesters lived in close proximity to schools, day care centers, or parks compared with 26% of perpetrators convicted of sex crimes against adult victims. Although the analysts could not prove that this statistic demonstrates that the molesters did this with an intent to have easier access to children with the likelihood of re-offending, the analysts did speculate that molesters who were motivated to re-offend might be more likely to purposely place themselves in close access to potential child victims.[55]

C. *2004 Colorado Office of Domestic Violence and Sex Offender Management Report.* Recently, the Colorado Office of Domestic Violence and Sex Offender Management produced its Report on Safety Issues Raised By Living Arrangements for and Location of Sex Offenders in the Community (hereinafter: the "*Report*").[56] The March 15, 2004 Colorado *Report* was produced for the Colorado Senate and House Judiciary Committees. The Report notes that the proximity of residences to school and child care facilities was not specifically analyzed as a part of the research project.

However, a series of maps showing the locations of 1,000 and 2,000 foot wide residential restriction buffers around school and day care facilities in various Colorado communities[57] was prepared for the *Report*. The maps are similar to the maps prepared for

---

53 Id., at 2.

54 Walker, Jeffrey T., Golden, James W., and VanHouten, Amy C., The geographic link between sex offenders and potential victims: A routine activities approach, Justice Research and Policy, 3(2), pp. 15-23 (Justice Research & Statistics Assoc. 2001).

55 Id.

56 The Office of Domestic Violence and Sex Offender Management is an agency of Colorado's State Government Sex Offender Management Board. The *Report* is on file with the City Attorney's Office and available for review upon request.

57 Portions of Denver, Ft. Collins, Jefferson County, Boulder, Colorado Springs, Alamosa, and Junction City.

this paper, and the *Report* notes that "in urban areas, a large number of schools and childcare centers are located within various neighborhoods, leaving extremely limited areas for sex offenders to reside if restrictions were implemented."[58]

The *Report* notes that this makes it difficult, if not impossible, to find areas that are affordable and not located near schools or child care centers.[59] The *Report* also notes that "[w]hile these ordinances are designed to limit options available to sexual offenders, ... this situation may increase their risk of re-offending by forcing them to live in communities where safe support systems may not exist or in remote areas providing them with high degrees of anonymity."[60] The support systems are vital to controlling recidivism, because research has found that recidivism among sexual offenders is related to several factors, including lack of social skills, chaotic lifestyle, and being disengaged from treatment.[61]

The conclusion reached in the *Report* was that "sex offenders who have committed a criminal offense (both sexual and non-sexual) while under criminal justice supervision appear to be randomly scattered throughout the study areas – there does not seem to be a greater number of these offenders living within proximity to schools and child care centers than other types of offenders."[62]

As a result, the Office of Domestic Violence and Sex Offender Management recommends that: "[p]lacing restrictions on the location of correctionaly [*sic*] supervised sex offender residences may *not* deter the sex offender from re-offending and should *not* be considered as a method to control sexual offending recidivism."[63]

D. *2003 Minnesota Department of Corrections Report.* Another study was completed by the Minnesota Department of Corrections as a report in 2003 to the Minnesota Legislature [hereinafter: the "*Minnesota Findings*"].[64] The Minnesota Findings looked at issues such as sexual predator residence proximity to certain uses, such as

---

58 *See* The *Report*, *supra*, at 4.

59 Id., *supra*, at 9.

60 The *Report*, *supra*, at 9 (footnote omitted).

61 Hanson, R.K. & Bussiere, M.T., Predicting Re-lapse: A meta-analysis of sexual offender recidivism studies, Journal of Consulting and Clinical Psychology, 66, 348-362 (1998); see The *Report*, *supra*, at 13 n.11.

62 The *Report*, *supra*, at 4.

63 Id. (emphasis supplied). To date the Colorado Legislature has taken no action, but the Speaker of the Colorado House of Representatives has recently resurrected the issue of further regulating sexual predators post-release. *See* Note 33, *supra*.

64 Level Three Sex Offenders Residential Placement Issues – 2003 Report to the Legislature, Minnesota Department of Corrections (rev. Feb. 2004).

16

schools, and the relationship of residence proximity to recidivism. Minnesota does not have residence restrictions such as Florida and 13 other states,[65] and relies on case-by-case determination of whether an offender is living too close to another offender or a school.[66]

Thus, the state is a good subject to ascertain what happens in a state when convicted offenders are permitted to reside near schools, day care facilities, and playgrounds. The Minnesota Findings noted that "[s]o far, there has not been one example of a level three offender [sexual predator] re-offending at a nearby school."[67]

The Department of Corrections analyzed a potential 1,500 foot residency buffer for schools to ascertain what its likely effect would be. The Department determined that,

> [r]esidential choices are already limited under current statutes that do not prohibit level three offenders from living near schools. Additional restrictions would severely affect already meager placement choices. . . . Having such restrictions in the cities of Minneapolis and St. Paul would likely force level three offenders to move to more rural areas that would not contain nearby schools and parks but would pose other problems, such as a high concentration of offenders with no ties to the community; isolation; lack of work, education, and treatment options; and an increase in the distance traveled by agents who supervise offenders. Again, no evidence points to any effect on offense rates of school proximity residential restrictions.[68]

The final findings and recommendations of the Department of Corrections included the following points:

Findings

1. Proximity restrictions would severely limit already scarce residential options for level three offenders.

2. There is no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense. Thirteen level three offenders released between 1997 and 1999 have been rearrested for a new sex offense since their release from prison, and in none of the cases has residential proximity to schools or parks been a factor

---

65 *See* Notes 68-80, *infra*.

66 *Minnesota Findings*, *supra*, at 9; *see also* §244.052(4)a, Minn.Stat.

67 *Minnesota Findings*, *supra*, at 9.

68 Id.

in the re-offense.

* * *

6. Proximity restrictions will have the effect of restricting level three offenders to less populated areas, with fewer supervising agents and fewer services for offenders (*i.e.*, employment, education, and treatment). The result of residential proximity restrictions would be to limit level three offenders to rural, suburban, or industrial areas.

Recommendations

1. Since blanket proximity restrictions on residential locations of level three offenders do not enhance community safety, the current offender-by-offender restrictions should be retained. Proximity restrictions, based on circumstances of an individual offender, serve as a valuable tool. Continued use – through extension of conditional release and specific release conditions and restrictions – is appropriate. Most of these supervision proximity restrictions address the issue of the offender associating or interacting with children or minors, rather than where the offender resides.

* * *

(emphasis supplied).[69]

E. *2005 Levenson & Cotter Report.* Probably the foremost study, perhaps because it is current and was prepared in Florida, is a recent study by Dr. Jill S. Levenson, a professor at Lynn University in Boca Raton, and Dr. Leo Cotter, a Tampa psychologist who treats sex offenders. The study notes that there are few studies that have investigated the relationship between residency restrictions and sex offending.[70] A nonrandom sample of 135 individuals who voluntarily agreed to complete the study survey and who were all subject to residency restrictions[71] was drawn from a pool of sex offenders who had been released from prison and utilized the services of two outpatient sex offender counseling centers in Ft. Lauderdale and Tampa. 40 of the individuals were from the Ft. Lauderdale center, and 90 of the individuals were from the Tampa center.[72]

---

69 *Minnesota Findings*, *supra*, at 11.

70 Levenson, Jill S. and Cotter, Leo P., The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?, International Journal of Offender Therapy and Comparative Criminology, pp. 168, 169 (Sage Publications 2005) (hereinafter: "Levenson & Cotter").

71 The residency restriction that the respondents were subject to consisted of the Florida's statutory requirement that sexual predators, if convicted after October 1, 1997, must reside more than 1,000 feet from a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate. §947.1405(7)(a)2., Fla.Stat.

72 Levenson & Cotter, *supra*, at 170. 47% of the participants had been in treatment for more than 2 years, and the clients had been on probation for an average of 40 months.

Over 50% of the respondents indicated that residency restrictions had forced them to move from the residence in which they were living. 25% indicated that they were unable to return to their residence after conviction.[73] Respondents gave the following responses to questions presented:

Item[74]	Yes
I had to move out of a home that I owned because of the 1,000 foot rule	22%
I have had to move out of an apartment that I rented because of the 1,000 foot rule	28%
When released from prison, I was unable to return to my home	25%
I have been unable to live with supportive family members because of the 1,000 foot rule	44%
I find it difficult to find affordable housing because of the 1,000 foot rule	57%
I have suffered financially because of the 1,000 foot rule	48%
I have suffered emotionally because of the 1,000 foot rule	60%

Respondents were interviewed with regard to social support from family and friends and its relationship to avoiding recidivism. Comments such as "I believe you have a better chance of recovery by living with supportive family members" and " What helps me is having support people around . . . . Isolation is not helpful."[75] Several participants reported that they had successfully petitioned the court for an exception to the rule and were allowed to reside within 1,000 feet of a school. The reasons for exceptions include home ownership or a desire to reside with family. The courts have seemed to accept these reasons without requiring a study to determine if the predator is truly dangerous or the modification of one of the conditions of release would lead to a chance of recidivism.[76]

The majority of respondents also emphatically proclaimed that the 1,000 foot rule would have no effect on their risk of re-offense.[77] Comments received with regard to the rule included: "It's a childish rule," "I follow the rule, but it has no effect at all on offending," "living 1,000 feet away [from a school or day care facility] compared to 900 feet doesn't prevent anything," and "it doesn't matter where a sex offender lives if he sets his mind on reoffending. . . . He can just get closer by walking or driving."[78] Some responses were

---

73 Id., at 172. Age seemed to be a significant factor with regard to being able to live with family and difficulty in finding affordable housing with younger offenders being more likely to report problems in this regard. Levenson & Cotter, *supra*, at 173.

74 Levenson & Cotter, *supra*, Table 2 Impact of Residential Restrictions, at 173.

75 Id.

76 Levenson & Cotter, supra, at 174.

77 Levenson & Cotter, *supra*, at 174.

78 Id.

more analytical. One respondent questioned if there is a "link between sex offending and distance from schools," or the 1,000 foot rule "serves no purpose but to give some people the illusion of safety."[79]

In brief, the Levenson & Cotter study found that "[m]ost of the molesters who responded to this survey indicated that housing restrictions increased isolation, created financial and emotional hardship, and led to decreased stability. . . . Although this study did not measure risk or recidivism, the findings appear to confirm prior speculation that proximity rules might increase the types of stressors that can trigger reoffense."[80]

One of the problems with every ordinance reviewed and that has been adopted by a municipality is that not one of them provides a procedure for exceptions to be made for good cause to the 2,000 or 2,500 foot residency restrictions adopted. Assuming that the City of Melbourne adopted a residency restriction ordinance, would Melbourne include a procedure for obtaining variances from a residency restriction and if so under what circumstances a variance should be permitted. What municipal board would hear the case and consider granting the variance?

F. *Individual Observations Recently Reported by the Media.* A number of individuals with expertise in dealing with sexual predators have criticized the recent trend of adopting residency restriction ordinances. Some of those in opposition are law enforcement officers. "Police and psychologists say barring sex offenders from living close to parks and playgrounds may be a waste of time, because research indicates very few offender crimes are committed close to the home of the offender. What's more, experts think some offenders will be pushed to commit new crimes due to the stress caused by moving from city to city."[81] Agent Justin Barley, an Orange County deputy whose job is to make sure convicted offenders are living at their registered addresses, is concerned that new laws limiting where offenders can live creates stress and could drive some offenders to prey upon new victims.[82]

A recent *St. Petersburg Times* article on sex offenders noted that the "stigma of being a sex offender severely limits housing options." Noting the existence of the 1,000 foot rule, a *Times* analysis of sex offender data found that offenders in the Tampa Bay area tend "to cluster in poor neighborhoods, staying in motels, apartments, mobile homes or anywhere

---

79 Levenson & Cotter, *supra*, at 174.

80 Id., at 175. This was apparently also discovered in another study performed by the Minnesota Department of Corrections in 2003.

81 WESH Channel 2, Experts Fear New Sex Offender Laws Will Do more Harm, www.wesh.com/news/4645901/detail.html (June 23, 2005).

82 Id.

that will take them."[83]

Dr. Leo Cotter, one of the authors of the 2005 Levenson & Cotter Florida study, believes that residency restrictions on sexual predators only keep predators away from specific locations, but the restrictions do not keep predators away from children. He also notes that children that are sexually abused are not strangers to the predators. They are family members or children of friends.[84] Hillsborough County prosecutor Mike Sinacore agrees noting that many sex offenses are crimes of opportunity in which an adult is supervising a child.[85]

While there has been broad support for the residential restrictions as may be gauged by the number of ordinances adopted by different communities,[86] some experts seem to disagree with the strategy. Grier Weeks, executive director of Protect, a nonpartisan children's advocacy group in Asheville, North Carolina, has been critical of residential restrictions and has stated that "[c]ommunities are being forced into changing zoning ordinances and doing things that they really shouldn't have to do because state . . . jurisdictions refuse to adequately contain and monitor convicted sex offenders."[87]

Weeks has noted that the predator residential restrictions are "a shame," and that they give a false sense of security. According to Weeks, "[y]ou have this panic, where people are talking about pedophile-free zoning restrictions, which is just not the way to do it. Anybody that thinks zoning ordinances are going to do the job is really just out to lunch."[88]

This is the same conclusion reached by Pompano Beach Mayor John Rayson.[89] During debate with regard to the City's sexual predator ordinance that bars predators from living within 2,500 feet of a school, park, or other area where children normally congregate. Rayson noted that the ordinance is nothing more than "a feel good thing. . . . The only basis you can pass this on is on an emotional basis."[90] Notwithstanding Mayor Rayson's

---

83 Dennis, Brady and Waite, Matthew, Where is a sex offender to live? St. Petersburg Times (May 15, 2005).

84 The *Report*, *supra*, at 4.

85 Dennis, Brady and Waite, Matthew, Where is a sex offender to live? St. Petersburg Times (May 15, 2005).

86 *See* Note 38, *supra*.

87 *See* Associated Press, City bans sex offenders, Florida Today Sec. B10 (June 9, 2005).

88 Id.

89 Mayor Rayson is a former member of the Florida House of Representatives.

90 *See* Renaud, Jean-Paul, Pompano stretches no-predator zone, South Florida Sun-Sentinel (July 17, 2005).

protestations, the ordinance was passed by the City Council on second reading by a 4 to 2 vote.[91]

VI. CASELAW ANALYSIS: Nationally, there are only a handful of cases that have examined residency restrictions. In Florida, apparently no appellate case has examined the legality of residency restrictions. However, there are a few Florida cases which indicate the pre-disposition of the courts against sexual predators. These cases give some idea what a Florida court might do when the residency restrictions are challenged.

A. Types of Claims Made: In the handful of cases relating to sexual predators and sex offenders, there are a number of claims made. Each of those claims is based on a violation of a provision in the U.S. Constitution.

1) Violation of Procedural Due Process or Substantive Due Process: Two types of claims are either a violation of the right of Procedural Due Process or Substantive Due Process. These types of claim usually relate to an action of the government that deprives the person of his liberty or his property. The claim that the predator's rights are being taken by government can be with regard to the process that the government uses or with regard to actually depriving the predator of a *fundamental right* that the predator has.

The court first has to determine whether a *fundamental right,* such as the right to marry or the right to have children, is at issue or whether the government's action is based on a so-called "suspect class" such as race, national origin, or gender of the predator. If a *fundamental right* or a *suspect class* is involved, the court applies the so-called "strict scrutiny" test to determine if the government's action is constitutional.

This test requires that the government justify its action by showing that the government's action is "narrowly tailored" to serve a "compelling interest" of the government. The test is a very difficult test, and it is almost impossible for the government to satisfy. If a *fundamental right* or a *suspect class* is not involved, the court applies the "rational basis" test, which is very deferential to the actions of the government. Basically, the court looks to see whether there is *any* rational reason for the existence of the statute. The government almost never loses cases in which this test is applied.

2) Violation of Equal Protection: The next type of claim usually asserted is a violation of the right of Equal Protection. This type of claim is usually made by asserting that the government's action somehow treats the sexual predator differently than other similarly situated persons. Again, if the predator's fundamental rights are involved, or the treatment is based on the predator's race, national origin or gender, the strict scrutiny test is applied. If a *suspect class* or a *fundamental right* is not at issue, then the highly deferential rational basis test is used by the court.

---

91 Id.

3) Violation of *Ex Post Facto* Clause: The third type of claim routinely made in this type of case is that an "extra penalty" is being placed on the predator. In other words, it is a penalty that did not exist at the time that the predator committed the act which caused him to be designated as a predator. This claim is that the residency restriction constitutes an *Ex Post Facto* law.

There are other constitutional claims that have been leveled against residency restrictions and other sexual predator/sex offender laws, and they are described in the following cases. However, the claims of Due Process denial, Equal Protection denial, and *Ex Post Facto* violation seem to have been made in most, if not all, of the handful of cases involving residency restrictions and other sexual predator/sex offender laws.

B. Is it legal in Florida to require sexual predators and sex offenders to submit to registration every year and whenever they move, to being photograph, to being fingerprint, to being required to give DNA samples, and to being placed on the FDLE web site? Short Answer: Yes based on two cases, including Doe v. Moore, a Federal circuit court of appeals case issued this summer, and Milks v. State, a Florida Supreme Court opinion, issued in February of this year.

1) *Doe v. Moore (Fla.) 11th U.S. Circuit Court of Appeals:* On June 6, 2005, the U.S. Circuit Court of Appeals for the 11th Circuit, which includes Florida, the court considered the constitutionality of Florida's sex offender act. This law requires offenders to register their home address with the local sheriff's office within 48 hours after release from prison or after moving to a new residence.

In addition, within another 48 hours thereafter, the offender must be photographed, fingerprinted and submit a blood sample for DNA purposes to the driver's license bureau which in turn submits the information to the Florida Department of Law Enforcement ("FDLE").[92] FDLE then posts the photograph by geographical location on its sex offender/sexual predator website.[93] FDLE's website in zip code 32901 lists 35 sex offenders and 2 sexual predators, and in zip code 32935, the website lists 61 sex offenders and 1 sexual predator.[94]

In Doe v. Moore,[95] a group of sex offenders contested the constitutionality of the registration, photographing, fingerprinting, and DNA sampling statute. All of the offenders were Florida residents. All were required by law to register as sex offenders. All were

---

92 §943.0435, Fla.Stat.

93 www.fdle.state.fl.us/sopu/index.asp?PSessionId=1071488967&

94 The listing is as of August 8, 2005. The web site is routinely updated.

95 410 F.3d 1337 (11th Cir. 2005).

photographed and have had identifying information posted on the FDLE website. Five of the individuals were found by a court to not be likely to re-offend. Eight of the individuals were required to submit blood for DNA purposes.[96]

The parties alleged that their constitutional right to Substantive Due Process[97] had been abridged by the statute, because the statute created an irrebutable presumption of "dangerousness"[98] and by doing so abridged their fundamental[99] right to liberty under the U.S. Constitution.[100] The court disagreed finding that there was no fundamental right to be free from having to disclose that you have been convicted of a crime, and that the statute does not restrict the parties freedom of action with respect to their families and therefore does not intrude on their right to privacy.[101] In fact, the court found a rational basis for the statute as "protecting the public from sexual abuse.[102]

Next the plaintiffs in Doe v. Moore, argued that the sex offender notification program was violative of the Equal Protection Clause of the U.S. Constitution. Because there was no *fundamental right* or *suspect class*[103] involved, the court disagreed with the plaintiffs, finding that the only class involved was that of felony offenders. Felony offenders are *not* a suspect

---

96 410 F.3d at 1340-41.

97 The question of the constitutionality of the sex offender registration statute, Section 943.0435, Florida Statutes, was also confronted in State of Florida v. Malone, Case No. 02-CF-18238, 10 Fla.L.Weekly 708a (13th Cir. July 9, 2003). *per curiam affm'd*, Case No. 03-3580 (Fla. 2d DCA Oct. 15, 2004). In this case the circuit court found that the statute survived a Substantive Due Process claim, was not violative of the right of a citizen to have access to the courts of the State as set forth in Article I, §21, Fla. Const. Of 1968, and that the plaintiff did not satisfy his burden of proof in regard to a claimed deprivation of Procedural Due Process.

98 410 F.3d at 1342 n.3.

99 If a fundamental right or suspect class is at stake, the court uses the so-called strict scrutiny test to ascertain whether the statute or ordinance is constitutional. This is a virtually impossible test to satisfy. If no fundamental right or suspect class is involved in the regulation by the statute or ordinance, the court looks only to see if there could be some "rational basis" or rational reason for the statute to exist.

100 Id., at 1342. According to the U.S. Supreme Court, to date so-called protected "liberty" interests under the U.S. Constitution Substantive Due Process clause include the right to marry, to have children, to direct the education and upbringing of one's children, the right to marital privacy, to use contraception, to bodily integrity, and to abortion. *See* Washington v. Glucksberg, 117 S.Ct. 2258 (1997).

101 410 F.3d at 1344-45.

102 410 F.3d at 1345.

103 A suspect class is a class of people regulated by a statute or ordinance that has been subject to historical discrimination, including classes based on race, alienage, national origin, gender, or illegitimacy. Haves v. City of Miami, 52 F.3d 918 (11th Cir. 1995).

class.[104] Thus, the court need only find a rational basis for the statute.

The plaintiffs argued that the statute offended the Equal Protection based on five (5) grounds, including: (a) the act treats sex offenders differently than other felons by requiring them to register and the length of time that they are required to register; (b) the act treats them differently from parents of victims of crimes such as kidnapping, false imprisonment, or enticing children; (c) those offenders found not guilty because of insanity are treated differently than other offenders; (d) the act impermissibly distinguishes between a person 18 years old or younger and a person 19 years of age or older by requiring only a 10-year registration period for younger offender; and (e) the state impermissibly treats offenders convicted before the Sex Offender Act was adopted differently from offenders convicted after adoption of the Sex Offender Act. As to each ground the court found a rational basis for the treatment and that the Sex Offender Act did not violate the Equal Protection Clause of the U.S. Constitution.[105]

Next, the plaintiffs alleged that the Sex Offender Act violated a fundamental Right to Travel under the U.S. Constitution.[106] In essence, citizens have a right to travel in this country wherever they wish, and it is unconstitutional to restrict the right of citizens to travel without a compelling reason. However, mere burdens on a person's ability to travel under the Constitution are not necessarily a violation of the Right to Travel.[107] Finding no violation, the court stated:

> Though we recognize this requirement is burdensome, we do not hold it is unreasonable by constitutional standards, especially in light of the reasoning behind such registration. The state has a strong interest in preventing future sexual offenses and alerting local law enforcement and citizens to the whereabouts of those that could reoffend.[108]

Thus, there was no Equal Protection violation.

2) *Milks v. State, (Fla.) Florida Supreme Court*: In Milks v. State, 894

---

104 Doe v. Moore, 410 F.3d at 1346.

105 410 F.3d 1347-48.

106 410 F.3d at 1348.

107 Saenz v. Roe, 119 S.Ct. 1518 (1999).

108 410 F.3d at 1348. The plaintiffs also argued that the statute violated Florida's separation of powers doctrine which is inherent in Florida's Constitution. *See* Art. II, §3, Fla.Const. The court found that it was unable to reach or decide the issue. 410 F.3d at 1349.

So.2d 924 (Fla. 2005), *petition for cert. filed*, Case No. 04-9997 (U.S. May 2, 2005), the plaintiffs. argued that the Florida Sexual Predators Act,[109] was unconstitutional. The Act, among other things, provides that if you meet certain criteria and have been convicted of committing certain crimes, you are a sexual predator, and you must comply with certain requirements, such as registration with the State every time that you move or on a periodic basis. There is no hearing, no due process, to determine if you are dangerous, and even if there were, the law is clear - - if you meet the criteria, you are a sexual predator.[110]

The plaintiffs claimed that the statute denied their constitutionally protected Procedure Due Process rights by not requiring a hearing to determine whether the plaintiffs were truly dangerous prior to being declared a "sexual predator." Based on U.S. Supreme Court precedent, the Florida Supreme Court found no violation of the plaintiffs' Procedural Due Process rights.[111] The plaintiffs also argued that the inflexible criteria that requires a person to be declared a sexual predator, if they meet certain criteria, constitutes a violation of the concept of the separation of powers[112] protected by the Florida Constitution.

In essence, the plaintiffs argue that the decision whether to declare one a sexual predator shouldn't be a legislative determination. It should be a judicial determination. The Florida Supreme Court rejected this argument, holding that the standards for determining one a sexual predator is a policy making decision that is properly a legislative determination.[113]

Although these cases do not discuss the issue of residency restrictions for sex offenders or sexual predators, they do reach the issue of rigid regulation, post conviction and incarceration, of sex offenders. Their reasoning sets a yardstick for a Florida or Federal court in Florida to use in reviewing the regulation of sexual predator residency restrictions.

C. *Are residency restrictions constitutionally valid*? Only one appellate court has issued a decision on this issue. The decision was reached by a Federal court in Iowa.

1) *Doe v. Miller, (Iowa) U.S. 8th Circuit Court of Appeals:* Doe v.Miller, 405 F.3d 700 (8th Cir. 2005), *rehearing en banc denied* (June 30, 2005), was decided by the 8th U.S. Circuit Court of Appeals, a Federal appellate court located in the Midwest, which is the last stop before the U.S. Supreme Court. To date the case is the only Federal appellate court decision with regard to residency restrictions, and the court approved them

---

109 §775.21 *et seq.*, Fla.Stat.

110 Milks v. State, 894 So.2d 924 at 925.

111 Milks v. State, 894 So.2d 924 at 926-928, *citing* Connecticut Department of Public Safety v. Doe, 123 S. Ct. 1160 (2003).

112 Art. II, §3, Fla.Const.

113 894 So.2d at 929.

as being constitutional. Originally decided by a 3-judge panel, the plaintiffs asked the full court of eleven (11) judges to reconsider the decision, but the full court refused to do so.

This case involved an Iowa statute which requires sex offenders to live more than 2,000 feet away from a school or a registered child care facility. The law does not apply to those individuals convicted prior to the effective date of the new law, and it does not apply to schools or day care facilities that are newly located after the effective date of the law.[114] The courted noted that areas restricted as a residence "in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence. In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders."[115]

Plaintiffs sought to invalidate the Iowa statute based on the constitutionally protected right to Procedural Due Process, Substantive Due Process, Right to Travel, interference with a perceived fundamental right to "live where you want to live," an unconstitutional violation of the Fifth Amendment forcing sex offenders to incriminate themselves, and that the 2,000 foot residency restriction is violative of the *Ex Post Facto* Clause of the U.S. Constitution. The appellate court found no violation of *any* of these provisions.

Plaintiffs argued that their constitutionally protected right to Procedural Due Process was violated, because the statute failed to give notice of what conduct is prohibited, and because it does not require an individualized determination whether each person covered by the statute is dangerous. The plaintiffs argued that the statute was procedurally bankrupt, because it was almost impossible to compute whether a residence is within 2,000 feet of a school or day care facility. However, the court stated that just because it was difficult to compute whether a particular residence was within 2,000 feet of a school or day care facility does not mean that the statute is void for vagueness or that it does not give notice of what conduct is precluded.[116] Thus, there was no violation of the right to Procedural Due Process.

Also, the plaintiffs argued that they were improperly classified as an offender without a specific hearing to ascertain, at the time of his release, whether they were truly dangerous or not. The court determined that Procedural Due Process is not violated if the statute does not provide an opportunity to be heard for each plaintiff. "Once a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not

---

114 Doe v. Miller, 405 F.3d 700, 705.

115 405 F.3d at 706. This is the same point that was raised during discussion by the Lighthouse Point City Commission regarding that City's proposed residency restrictions for sexual predators. *See* Notes 45-47, *supra*.

116 405 F.3d at 708.

provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren."[117]

With regard to the claim that the plaintiffs' Substantive Due Process rights had been violated, because the plaintiffs' right to privacy, choice in family matters, and the right to travel were all violated, the court found no violation.[118] The Plaintiffs argued that the court should "create" a new fundamental right, that of a right to live where you want. The court declined, finding that the statute does nothing to limit who you want to live with and is therefore irrelevant to the issue of constitutionality of the statute.[119] With regard to the right to travel, the court also disagreed with the Plaintiffs, finding that the right to travel as a fundamental right applies to interstate travel and not to intrastate travel. The statute poses no obstacles to a sex offender's entry into Iowa, and it does not pose a barrier to interstate travel. Thus, the right to travel is not even an issue in this case.[120]

With regard to the right of Due Process, both substantive and procedural, the court found that there was a rational basis for the statute in that it was designed to promote the safety of children. Further, any contention that there was no scientific study to support the statute was not a fatal flaw to the statute. The court stated that, "[w]e reject the contention, because we think it understates the authority of the state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable."[121] The court also found that whether to set the limit of proximity as 500 feet, 2,000 feet, or 3,000 is not a task for the Federal courts. It is just the type of task for which elected

---

117 405 F.3d at 709. In State v. Seering, ___ N.W.2d ___, 2005 WL 1790924 (Iowa July 29, 2005), the Iowa Supreme Court rejected arguments that the state's 2,000 foot residency restrictions violated Procedural Due Process. The Court found no fundamental right was being violated by the state, applied the rational basis test, and found no violation of Seering's Procedural Due Process right. Id., 2005 WL 1790924, op. at 6-8.

118 *Accord* Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004)(sexual offender was banned from all city parks; provision did not violate Due Process rights of offender); State v. Seering, ___ N.W.2d ___, 2005 WL 1790924, op. at 4-6 (Iowa July 29, 2005)(no fundamental right at issue; rational basis test applied; no Substantive Due Process denial found).

119 405 F.3d at 710.

120 405 F.3d at 711-12. Some courts have recognized a fundamental right to intrastate travel. Johnson v. City of Cincinnati, 310 F.3d 484, 496-98 (6th Cir. 2002); King v. New Rochelle Municipal Housing Authority, 442 F.2d646, 647-68 (2d Cir. 1971). Other courts have held that there is no fundamental right to intrastate travel. Andre v. Board of Trustees of Maywood, 561 F.2d 48, 52-53 (7th Cir. 1977); Wright v. City of Jackson, 506 F.2d 900, 901-02 (5th Cir. 1975). The U.S. Supreme Court has not addressed the existence of a fundamental right to intrastate travel. Memorial Hospital v. Maricopa County, 94 S.Ct. 1076 (1974). The Miller court found no need to reach the issue, because the Iowa statute does not stop one from entering or leaving any area of the state, only living within certain areas. Miller, 405 F.3d at 713.

121 405 F.3d at 714.

policymaking officials are suited.[122]

With regard to the argument that the statute forces a sexual offender to incriminate himself in violation of the Fifth Amendment, the court rejected this claim, because the statute does not force a sexual offender to be a witness against himself. It merely requires him to register and to obey certain residency restrictions once he has been convicted.[123] Finally, the statute is not an *ex post facto* law, because it does not add an additional penalty to that which was in existence prior to the time that the criminal act was committed.[124]

2) *State v. Seering (Iowa) Iowa Supreme Court:* In addition to a number of Due Process and Ex Post Facto constitutional violations alleged by the plaintiff, the plaintiff argued that the 2,000 foot residency restriction compelled him to incriminate himself[125] by its requirement that he register his home address which was apparently located in a restricted area. The Iowa Supreme Court disagreed noting that the charge that the plaintiff made in this case related to the residency restriction, not the separate registration requirement. "The residency restriction cannot serve to support a claim of self-incrimination because there is nothing about the restrictions that compels sex offenders to be witnesses against themselves."[126]

In State v. Seering, the plaintiff also claimed that the residency restriction was cruel and unusual punishment, which is prohibited by the Eighth Amendment to the U.S. Constitution. This provision of the Constitution prohibits torture, barbaric acts, or extreme penalties and sentences which are disproportionate to the offense charged. The court did not find the residency restriction to be torture, barbaric, or an extreme penalty disproportionate to the offense charged.[127]

VII. WHAT THE EFFECT OF SUCH AN ORDINANCE WOULD BE IN MELBOURNE:

---

122 405 F.3d at 715.

123 Id., at 716.

124 405 F.3d at 718-723; *accord* Thompson v. State, 603 S.E.2d 233 (Ga. 2004)(1,000 foot residency restriction from child care facility or school does not violate *Ex Post Facto* clause of the Constitution); Lee v. State, 895 So.2d 1038 (Ala.Crim.App.2004);)(2,000 foot residency restriction from child care facility or school does not violate *Ex Post Facto* clause of the Constitution); State v. Seering, ___ N.W.2d ___, 2005 WL 1790924, op. at 8-10 (Iowa July 29, 2005)(Seering claims that he was effectively "banished" by the residency restriction; Iowa Supreme Court disagrees and finds no violation of *Ex Post Facto* clause).

125 The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."

126 State v. Seering, ___ N.W.2d ___, 2005 WL 1790924, op. at 10-12 (Iowa July 29, 2005).

127 Id., op. at 12.

Attached you will find a series of maps which depict the following:

First Map – Shows the effect of the State of Florida's statutorily required 1,000 foot buffer or residence restriction around day care centers, parks, and schools;

Second Map – Shows the effect of a 1,000 foot buffer or residence restriction individually around day care centers, the effect of a 1,000 foot buffer or residence restriction around parks, and the effect of a 1,000 foot buffer or residence restriction around schools;

Third Map – Shows the effect of a 2,000 foot buffer or residence restriction around day care centers, parks, and schools;

Fourth Map – Shows the effect of a 2,000 foot buffer or residence restriction individually around day care centers, the effect of a 2,000 foot buffer or residence restriction around parks, and the effect of a 2,000 foot buffer or residence restriction around schools;

Fifth Map – Shows the effect of a 2,500 foot buffer or residence restriction around day care centers, parks, and schools; and

Sixth Map – Shows the effect of a 2,500 foot buffer or residence restriction individually around day care centers, the effect of a 2,500 foot buffer or residence restriction around parks, and the effect of a 2,500 foot buffer or residence restriction around schools.

It should be noted that once a 2,000 foot residence restriction is adopted, there become few areas of the City in which a sexual predator could live. This starts to approach a situation similar to that found to exist in Lighthouse Point and as noted in Iowa in Doe v. Miller.[128] If there is no place for a sexual predator to live, questions regarding the legality and constitutionality of the residence restriction become more critical. Another issue of importance for consideration is whether the enhanced residency restriction will cause such severe housing problems for predators, that the housing shortage will cause them to become psychologically more unstable, thereby potentially causing the rate of recidivism to rise.[129]

VIII. SUMMARY: There appears to be two reasons for residency restrictions, including (1) dealing with fear of predators among citizens by keeping them away from the places that children are most likely to be found; and (2) making predators live in a location that is not "next door" to the locations where children are most likely to be found.

It appears that there are really no studies to support the first reason for having these restrictions, that of dealing with the community fear of predators, but perhaps it is not necessary to have a study, because it seems fairly obvious that there is a general feeling

---

128 *See* Notes 49-51, *supra.*

129 *See* Notes 64-65 & 83-85, *supra.*

among most people that you talk with that they simply don't want predators around. The question is whether the residential restriction is a reasonable approach to dealing with the presence of community fear and disgust of sexual predators.

With regard to the second basis for having residence restrictions, that of taking away "temptation" from predators by restricting them to locations where they will not come in contact with large numbers of children, there is some evidence to suggest that this approach may actually exacerbate the predator recidivism rate.

While the residence restrictions have not been declared constitutional in Florida, forcing post-incarceration registration, fingerprinting, photographing, registration, and DNA sampling have been held to be legal by a Florida Federal appellate court and to a lesser extent by the Florida Supreme Court. Sexual predator residence restrictions of 2,000 feet have been upheld by an Iowa Federal appellate court and similar types of restrictions have been held constitutional by a handful of state courts. Thus, the trend by the courts appears to be supportive of finding this type of residential restriction to be constitutional.

PRG/cj
Attachment

pc: Jack M. Schluckebier, Ph.D, City Manager

City Council/Sexual Predators Council1.Mem

ORDINANCE NO. 2005-119

AN ORDINANCE OF THE CITY OF MELBOURNE, BREVARD COUNTY, FLORIDA, RELATING TO SEXUAL OFFENDERS AND SEXUAL PREDATORS; MAKING FINDINGS; CREATING SECTIONS 20-90 THROUGH 20-92, CITY CODE; PROVIDING FINDINGS AND DEFINITIONS; REQUIRING REGISTRATION WITH THE CHIEF OF POLICE OR THE CHIEF'S DESIGNEE; REPEALING ORDINANCES AND RESOLUTIONS INCONSISTENT HEREWITH; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN ADOPTION SCHEDULE.

WHEREAS, the population of the City of Melbourne, Florida, is approximately 75,000 people; and of those, 106 are sexual predators or offenders, making one in every 707 Melbourne residents a sexual predator or offender; and

WHEREAS, the number of children in Melbourne has increased over five years by approximately 700 students to just over 8,000 students; and

WHEREAS, Melbourne is part of Brevard County, which is the ninth largest school district in Florida, with approximately 19,000 students in the attendance areas of the 18 schools located in the Melbourne area alone; and

WHEREAS, the City Council is deeply concerned about the numerous recent occurrences in Florida and elsewhere, whereby convicted sex offenders who have been released from custody repeat the unlawful acts for which they had been originally convicted; and

WHEREAS, the City Council finds from the evidence that the recidivism rate for released sex offenders is alarmingly high, especially for those who commit their crimes on children; and

WHEREAS, the City Council desires to establish policy, which provides the maximum protection of the lives and persons in Melbourne; and

WHEREAS, this ordinance is adopted pursuant to the City's home rule powers in Article VIII, Section 2, Florida Constitution of 1968, and Section 166.021, Florida Statutes.

BE IT ENACTED BY THE CITY OF MELBOURNE, FLORIDA:

SECTION 1. That the City Code of Melbourne, Florida, is hereby amended by adding an article to be numbered VI. and a section to be numbered 20-90, which said section reads as follows:

ARTICLE VI. Sexual Predators and Offenders.

Sec. 20-90. Findings.

(a) Repeat sexual offenders, sexual offenders who use physical violence, sexual offenders who prey on children, and sexual predators are sexual violators who present an extreme threat to the public safety. Sexual violators are extremely likely to use physical violence and to repeat their offenses, and many sexual violators commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sexual violator victimization to society at large, while incalculable, clearly exorbitant.

(b) The high level of threat that a sexual violator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the city with sufficient justification to implement a strategy that includes registration and tracking of sexual violators residing within the city in an effort to assure that citizens, and in particular children, are secure from the potential threats of sexual violators.

(c) The city has a compelling interest in protecting the public from sexual violators and in protecting children from predatory sexual activity, and there is sufficient justification for requiring an active registration and tracking program for sexual violators.

SECTION 2. That the City Code of Melbourne, Florida, is hereby amended by adding a section to be numbered 20-91, which said section reads as follows:

Sec. 20-91. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"Permanent residence" means a place where the person abides, lodges, or resides for 14 or more consecutive days.

"Sexual Violator" means any person who has been:

1. designated as a "sexual predator" pursuant to s. 775.21, Florida Statutes; or

2. is a "sexual offender" as defined in s. 943.0435, Florida Statutes.

"Temporary residence" means a place where the person abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not the person's permanent address, or a place where the person routinely abides, lodges, or resides for a period of four or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence.

SECTION 3. That the City Code of Melbourne, Florida, is hereby amended by adding a section to be numbered 20-92, which said section reads as follows:

Sec. 20-92. Sexual violator registration.

(a) Registration.

(1) Except if a sexual violator is in the physical custody of the Florida Department of

Corrections, a private correctional facility, a federal correctional agency, or the sheriff of Brevard County, a sexual violator convicted of an act causing the sexual violator to be convicted as a sexual predator or sexual offender and classified as such, which act occurred after December 13, 2005, and who is a permanent resident or a temporary resident within the city must register with the city's chief of police, or his designee, by providing the following information to the department:

a. Name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, photograph, address of legal residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box, date and place of any employment, date and place of each conviction, fingerprints, and a brief description of the crime or crimes committed by the sexual violator. A post office box shall not be provided in lieu of a physical residential address.

1. If the sexual violator's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in Chapter 320, Florida Statutes, the sexual violator shall also provide to the chief of police, or the chief's designee, written notice of the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If a sexual violator's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in Chapter 327, the sexual violator shall also provide to the chief of police, or said chief's designee, written notice of the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

2. If the sexual violator is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual violator shall also provide to the chief of police, or the chief's designee, the name, address, and county of each institution, including each campus attended, and the sexual violator's enrollment or employment status. Each change in enrollment or employment status shall be reported in person at the chief of police's office.

b. Any other information determined necessary by the city chief of police, including criminal and corrections records; non-privileged personnel and treatment records; and evidentiary genetic markers when available.

(2) Sexual violators required to register pursuant to this section shall register or re-register in person at the office of the city chief of the police, or the chief's designee, within 48 hours after establishing a permanent residence or temporary residence in this city. Any change in the sexual violator's permanent residence or temporary residence or name, after the sexual violator registers in person at the office of the chief of police, or the chief's designee, shall be accomplished in the manner provided herein. When a sexual violator registers with the city chief of police, or the chief's designee, the chief of police shall take a photograph and a set of fingerprints of the sexual violator and compare them against records on file with the Florida Department of Law Enforcement to assure that the sexual violator's registration on file with the department is correctly registered. If the records of the Florida Department of Law Enforcement do not correspond with the registration filed with the chief of police, the chief of police shall immediately notify the Florida Department of Law Enforcement in writing.

(b) Time of registration.

(1) If a sexual violator's birth month is January, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of April and October. If a sexual violator's birth month is February, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of May and November. If a sexual violator's birth month is March, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of June and December. If a sexual violator's birth month is April, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of July and January. If a sexual violator's birth month is May, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of August and February. If a sexual violator's birth month is June, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of September and March. If a sexual violator's birth month is July, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of October and April. If a sexual violator's birth month is August, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of November and May. If a sexual violator's birth month is September, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of December and June. If a sexual violator's birth month is October, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of January and July. If a sexual violator's birth month is November, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of February and August. If a sexual violator's birth month is December, the sexual violator must register or reregister with the city chief of police, or the chief's designee, during the months of March and September.

(2) Additional times of registration.

a. Within 48 hours after any change of the sexual violator's permanent residence or temporary residence within the city or change in the sexual violator's name by reason of marriage or other legal process, the sexual violator shall report in person to the city chief of police, or the chief's designee, and shall register as set forth above.

b. A sexual violator who vacates a permanent residence or temporary residence within the city and fails to establish or maintain another permanent residence or temporary residence within the city shall, within 14 days after vacating the permanent residence or temporary residence within the city, report in person to the city chief of police, or the chief's designee. The sexual violator shall specify the date upon which he or she intends to or did vacate such permanent residence or temporary residence. The sexual violator must provide or update all of the registration information required under this section. The sexual violator must provide an address for the permanent residence, temporary residence or other location that he or she is or will be occupying during the time in which he or she fails to establish or maintain a permanent residence or temporary residence.

c. A sexual violator who remains at a permanent residence or temporary residence after reporting his or her intent to vacate such residence shall, within 48 hours after the date upon which the violator indicated he or she would or did vacate such temporary residence or permanent residence, report in person to the city chief of police, or the chief's designee, for the purpose of reporting his or her address at such residence.

(3) A sexual violator who intends to establish residence in another city, state, or jurisdiction shall report in person to the city chief of police, or the chief's designee, within 48 hours before the date he or she intends to leave this city to establish a permanent residence or temporary residence in another city, state, or jurisdiction. The sexual violator must provide to the city chief of police, or the chief's designee, the address, municipality, county, and state or other location of intended residence. The chief of police shall notify the statewide law enforcement agency, or a comparable agency, in the intended state or jurisdiction of residence of the sexual violator's intended residence. The failure of a sexual violator to provide his or her intended place of residence is punishable as provided in section 1-10 of this code.

(4) A sexual violator who indicates his or her intent to reside in another city, state or other jurisdiction and later decides to remain in this city shall, within 48 hours after the date upon which the sexual violator indicated he or she would leave this city, report in person to the chief of police, or the chief's designee, of his or her intent to remain in this city. A sexual violator who reports his or her intent to reside in another city, state or other jurisdiction, but who remains in this city without reporting to the chief of police in the manner required by this code, commits a municipal ordinance violation punishable as provided by section 1-10, City Code.

(5) The chief of police is responsible for maintaining all information obtained from sexual violators concerning registration and re-registration of sexual violators within the city. The chief of police shall also be responsible for determining whether the aforesaid information is consistent with registration information of the on-line internet web-site maintained by the Florida Department of Law Enforcement. If current information on file with the chief of police is inconsistent with information on the on-line internet web-site maintained by the Florida Department of Law Enforcement, the chief of police shall advise the Brevard County sheriff and the Florida Department of Law Enforcement.

a. The chief of police's sexual violator registration list, containing the information described above is a public record. The chief of police is authorized to disseminate this public information by any means deemed appropriate to assure the requirements of this code are complied with, unless the chief of police determines that the information is confidential or exempt from public disclosure pursuant to Florida or federal law.

b. A sexual violator must maintain registration with the city for the duration of his or her residency within the city, unless the sexual violator is no longer required by law or court order to maintain registration with the state of Florida or, until such time as the sexual violator moves from the city and is no longer an occupant of housing or a resident within the city.

(6) The failure of a sexual violator to register as provided herein is punishable as provided in section 1-10 of this code.

SECTION 4. Severability/Interpretation Clause.

(a) In the event that any term, provision, clause, sentence or section of this Ordinance shall be held by a court of competent jurisdiction to be partially or wholly unenforceable or invalid for any reason whatsoever, any such invalidity, illegality, or unenforceability shall not affect any of the other or remaining terms, provisions, clauses, sentences, or sections of this Ordinance, and this Ordinance shall be read

and/or applied as if the invalid, illegal, or unenforceable term, provision, clause, sentence, or section did not exist.

(b) In interpreting the provisions of this Ordinance, words underlined are additions to existing text.

SECTION 5. Ordinances and Resolutions in Conflict. That all ordinances or resolutions or parts thereof that may be determined to be in conflict herewith are hereby repealed.

SECTION 6. Effective Date. That this ordinance shall become effective immediately upon its adoption in accordance with the Charter of the City of Melbourne.

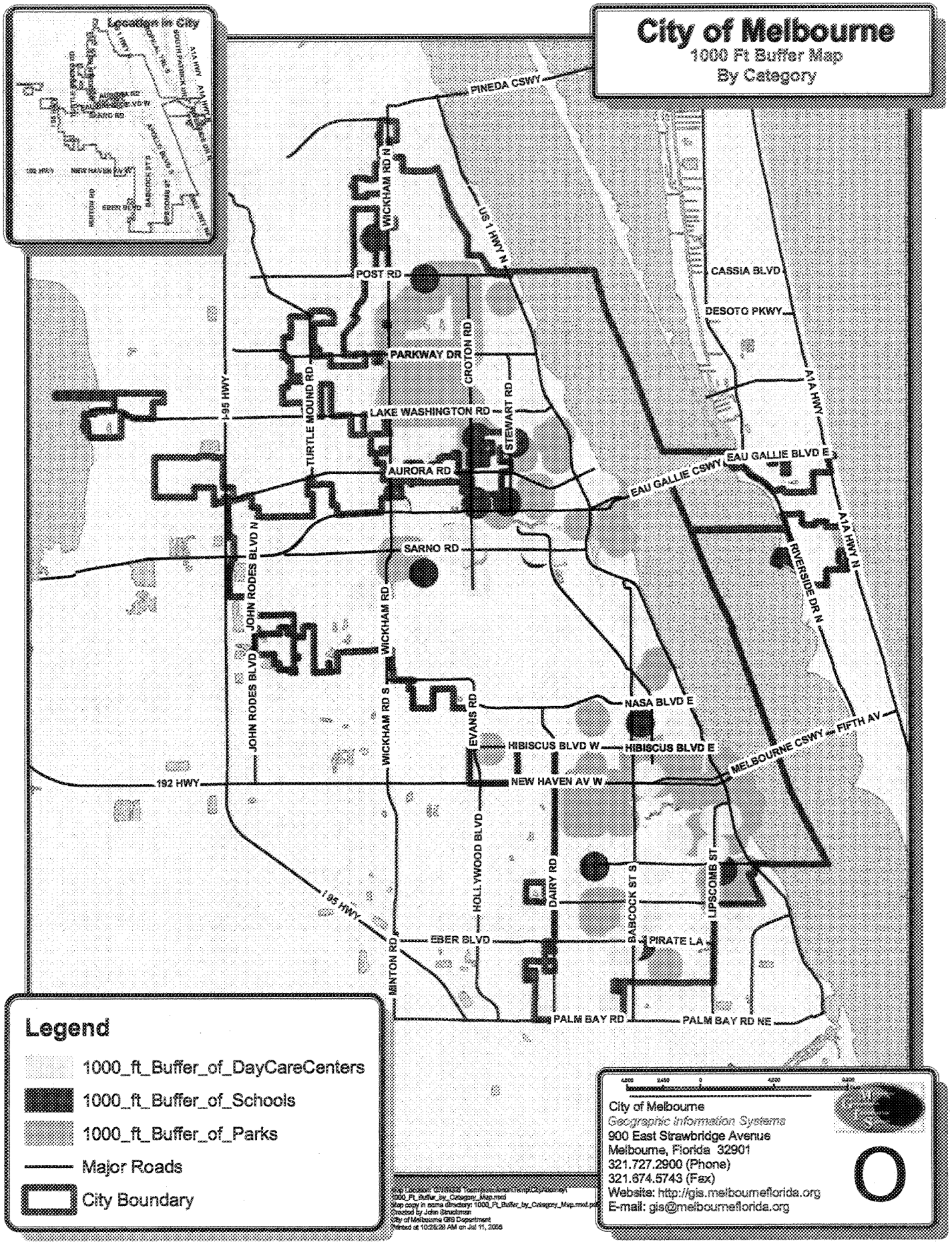
SECTION 7. That this ordinance was passed on the first reading at a regular meeting of the City Council on the____ day of _____, 2005 and adopted on second/final reading at a regular meeting of the City Council on the ____ day of _____, 2005.

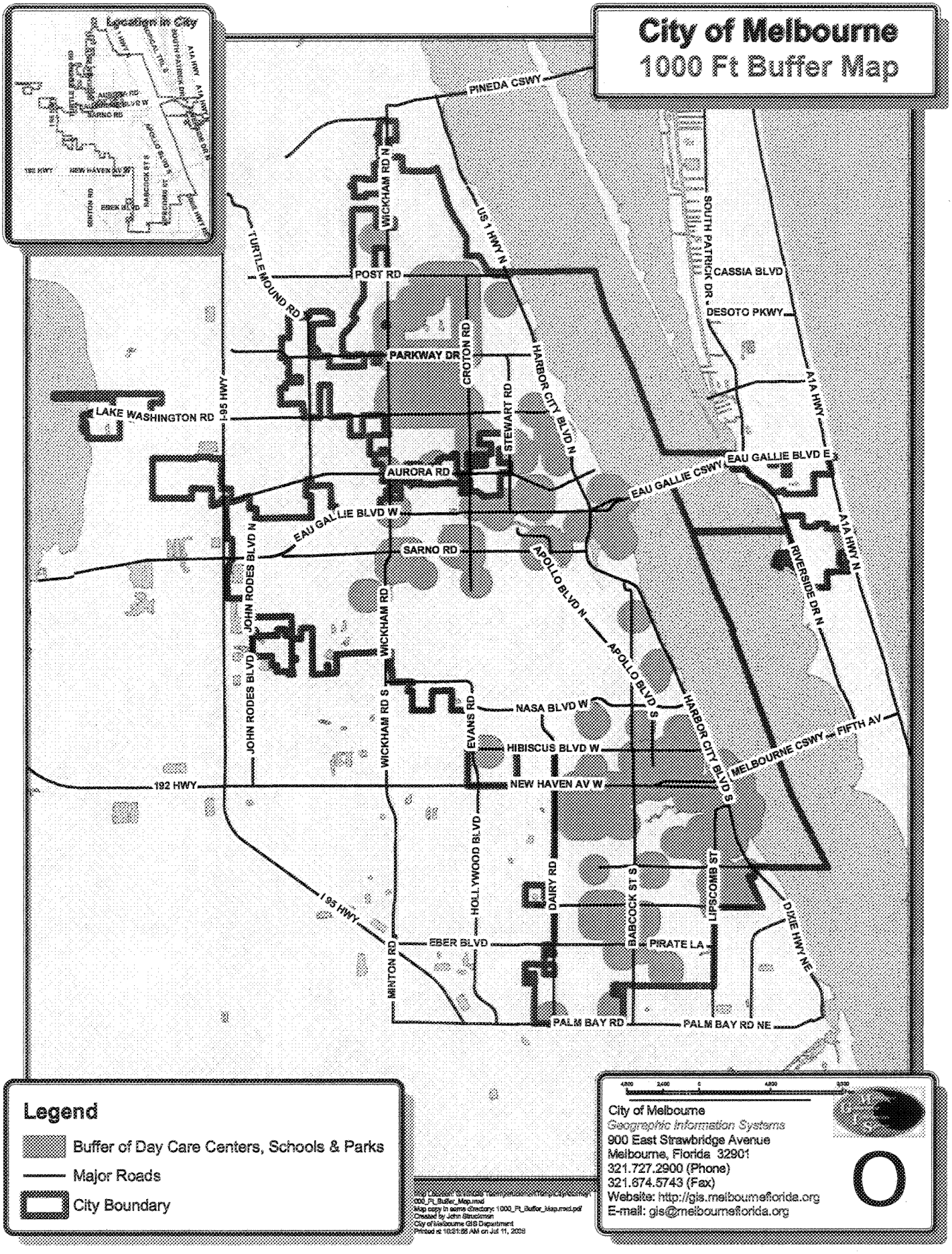
BY: _____
Harry C. Goode Jr., Mayor

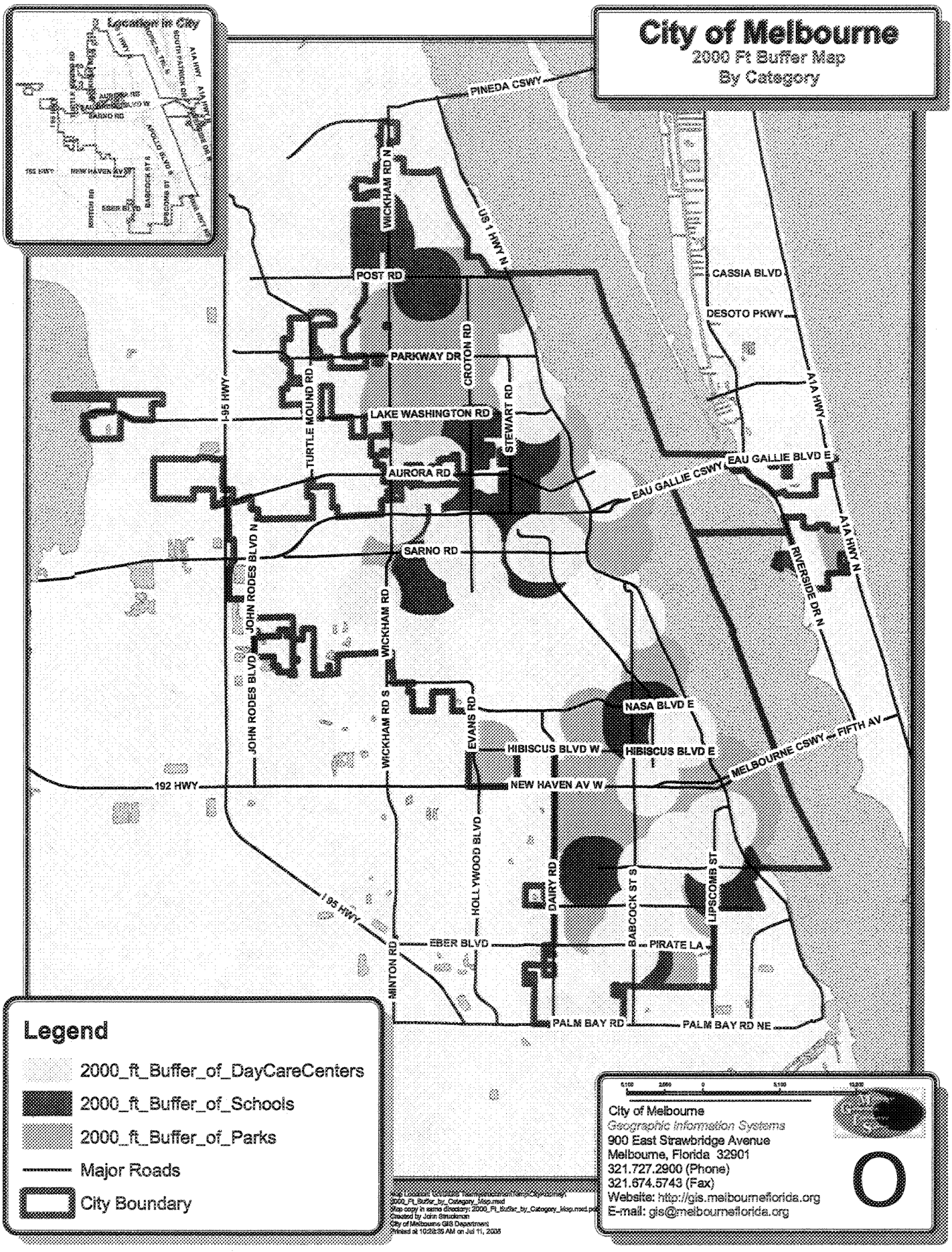
ATTEST:

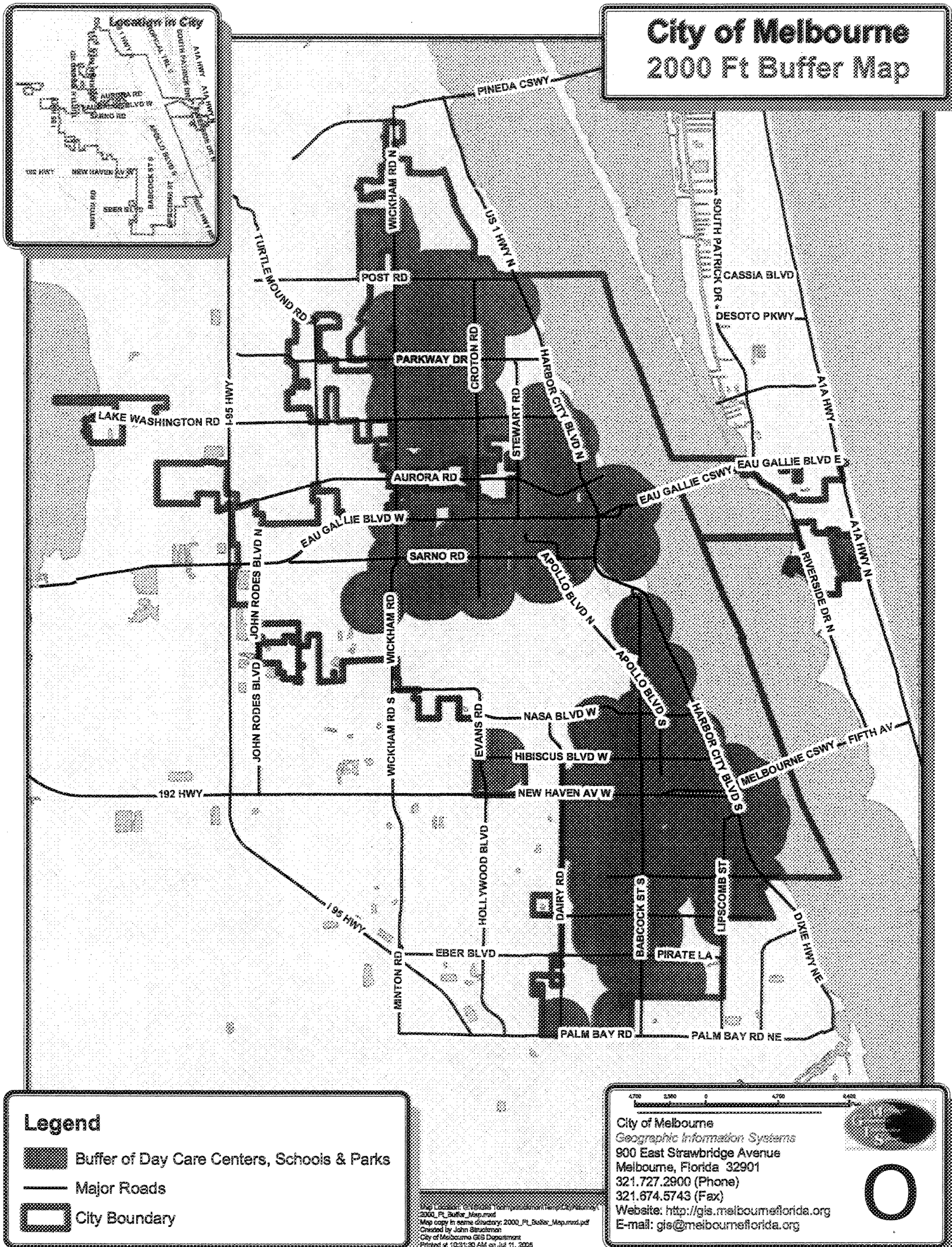
_____
Cathleen A. Wysor, City Clerk

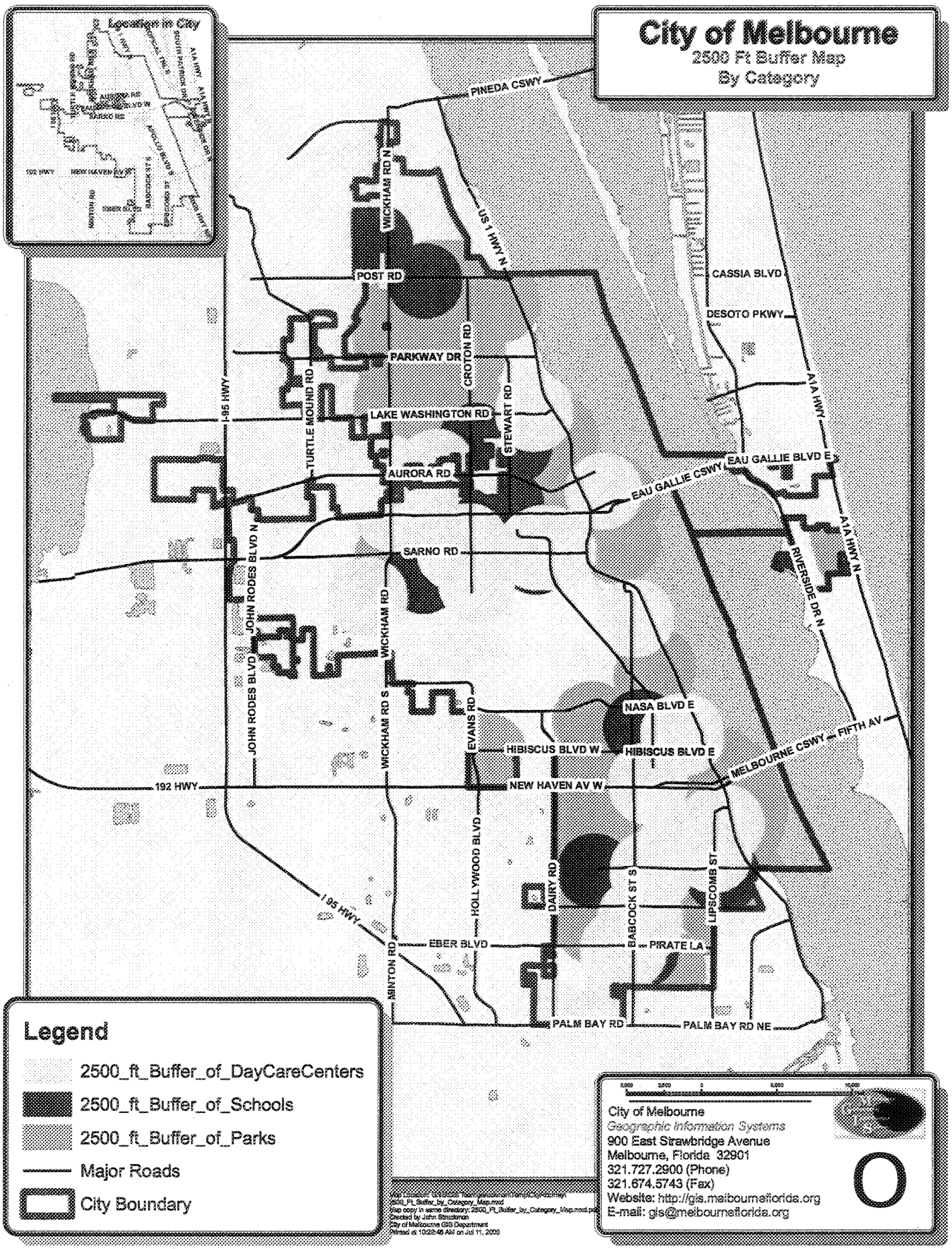
Ordinance No. 2005-119

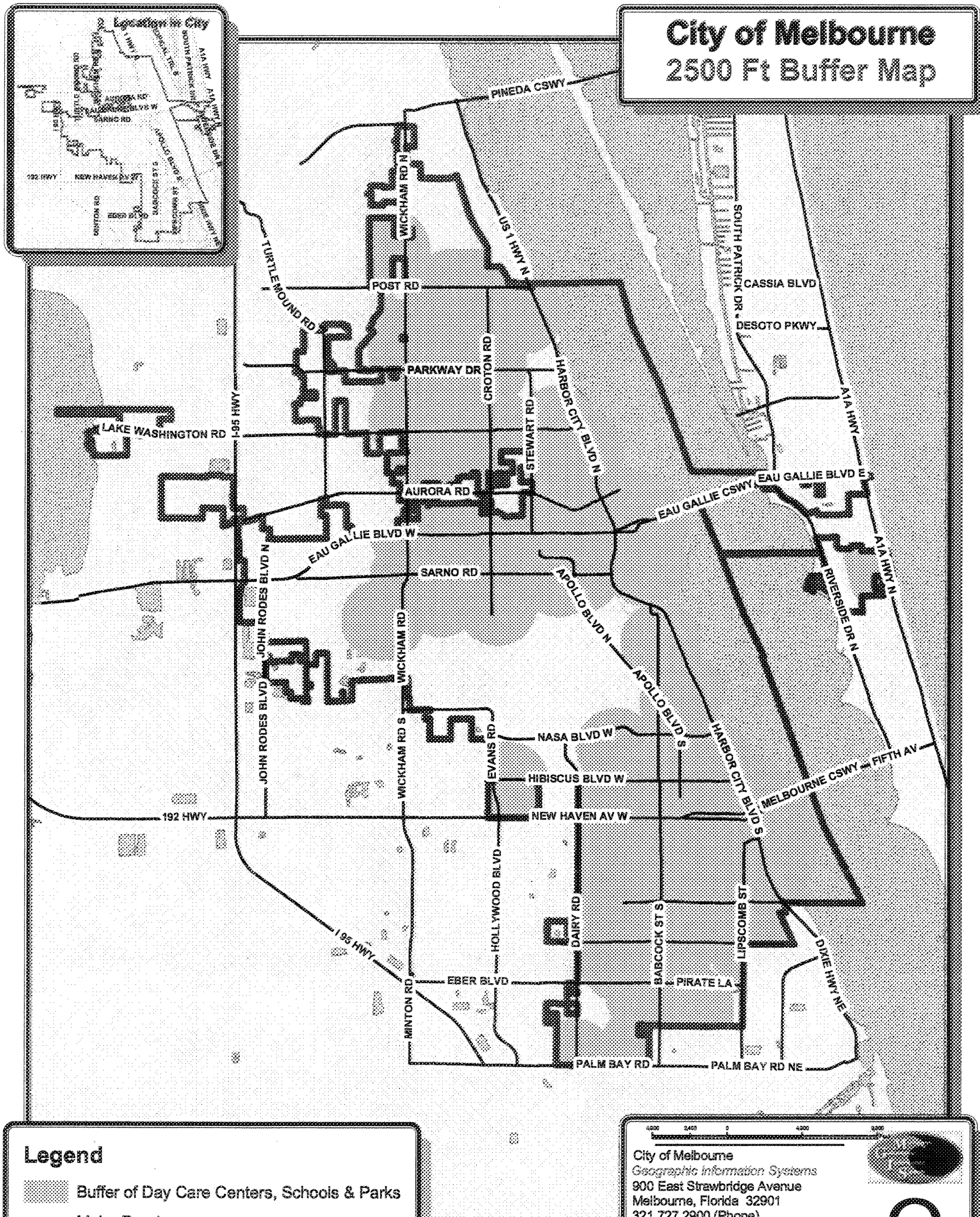

Location in City
City of Melbourne
1000 Ft Buffer Map
By Category
PINEDA CSWY
WICKHAM RD N
N U.S. 1 HWY
POST RD
CASSIA BLVD
DESOTO PKWY
PARKWAY DR
CROTON RD
A1A HWY
I-95 HWY
TURTLE MOUND RD
STEWART RD
LAKE WASHINGTON RD
EAU GALLIE BLVD E
AURORA RD
EAU GALLIE CSWY
A1A HWY N
JOHN RODES BLVD N
SARNO RD
RIVERSIDE DR N
JOHN RODES BLVD
WICKHAM RD
WICKHAM RD S
EVANS RD
NASA BLVD E
HIBISCUS BLVD W
HIBISCUS BLVD E
MELBOURNE CSWY
FIFTH AV
192 HWY
NEW HAVEN AV W
HOLLYWOOD BLVD
DAIRY RD
BABCOCK ST S
LIPSCOMB ST
I-95 HWY
MINTON RD
EBER BLVD
PIRATE LA
PALM BAY RD
PALM BAY RD NE
Legend
1000_ft_Buffer_of_DayCareCenters
1000_ft_Buffer_of_Schools
1000_ft_Buffer_of_Parks
Major Roads
City Boundary
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org

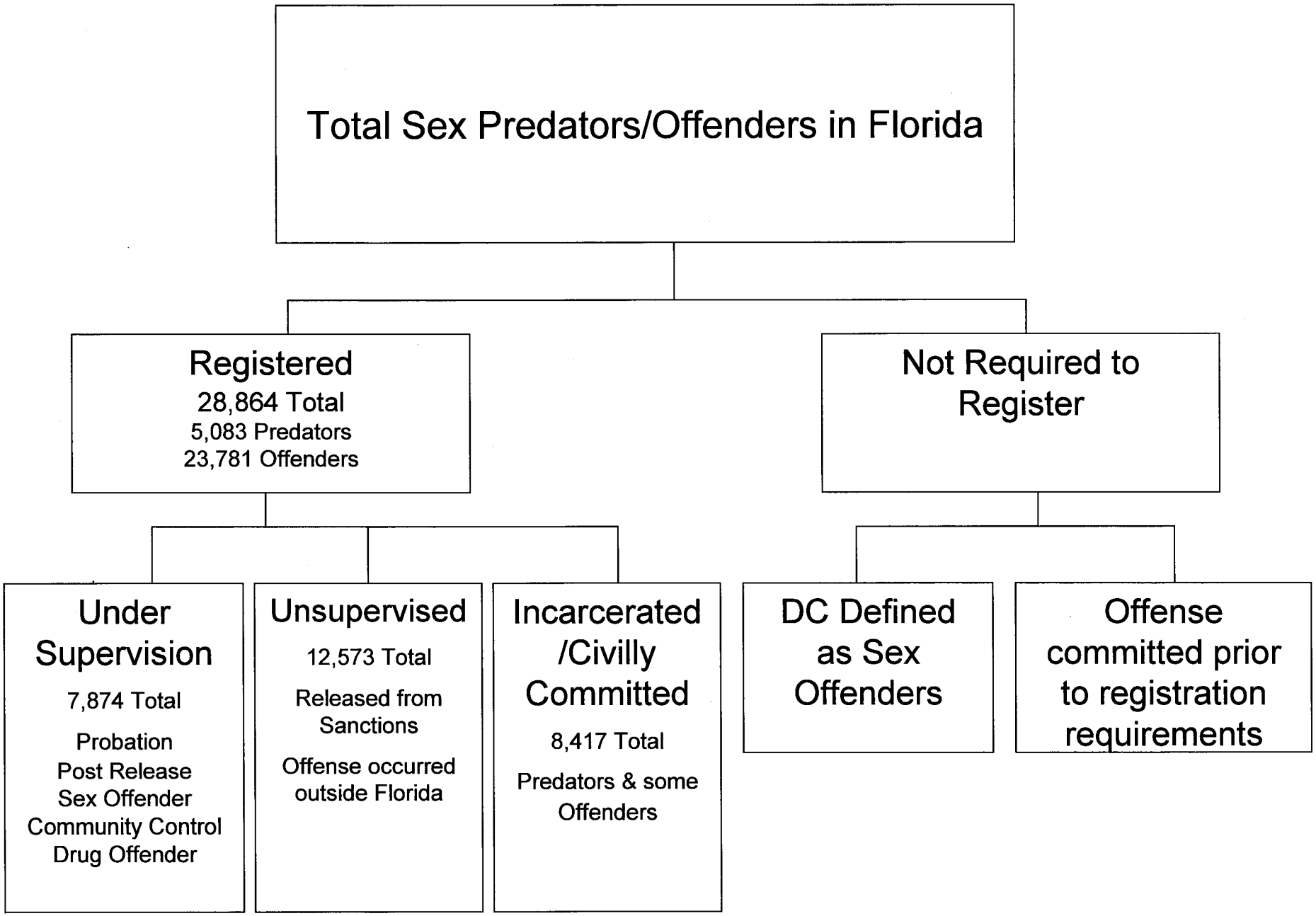

City of Melbourne
1000 Ft Buffer Map
Location in City
PINEDA CSWY
WICKHAM RD N
US 1 HWY N
SOUTH PATRICK DR
CASSIA BLVD
DESOTO PKWY
TURTLE MOUND RD
POST RD
PARKWAY DR
CROTON RD
HARBOR CITY BLVD N
A1A HWY
I-95 HWY
LAKE WASHINGTON RD
STEWART RD
AURORA RD
EAU GALLIE CSWY
EAU GALLIE BLVD E
EAU GALLIE BLVD W
SARNO RD
JOHN RODES BLVD N
APOLLO BLVD N
RIVERSIDE DR N
A1A HWY N
JOHN RODES BLVD
WICKHAM RD
WICKHAM RD S
APOLLO BLVD S
NASA BLVD W
EVANS RD
HARBOR CITY BLVD S
FIFTH AV
MELBOURNE CSWY
HIBISCUS BLVD W
192 HWY
NEW HAVEN AV W
HOLLYWOOD BLVD
DAIRY RD
BABCOCK ST S
LIPSCOMB ST
DIXIE HWY NE
I 95 HWY
MINTON RD
EBER BLVD
PIRATE LA
PALM BAY RD
PALM BAY RD NE
Legend
Buffer of Day Care Centers, Schools & Parks
Major Roads
City Boundary
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org
1000_Ft_Buffer_Map.mxd
Map copy in same directory: 1000_Ft_Buffer_Map.mxd.pdf
Created by John Struckmon
City of Melbourne GIS Department
Printed at 10:21:55 AM on Jul 11, 2008


City of Melbourne
2000 Ft Buffer Map
By Category
Location in City
PINEDA CSWY
WICKHAM RD N
US 1 HWY N
CASSIA BLVD
POST RD
DESOTO PKWY
PARKWAY DR
CROTON RD
A1A HWY
I-95 HWY
TURTLE MOUND RD
LAKE WASHINGTON RD
STEWART RD
EAU GALLIE BLVD E
AURORA RD
EAU GALLIE CSWY
A1A HWY N
JOHN RODES BLVD N
SARNO RD
RIVERSIDE DR N
WICKHAM RD
JOHN RODES BLVD
NASA BLVD E
WICKHAM RD S
EVANS RD
HIBISCUS BLVD W
HIBISCUS BLVD E
MELBOURNE CSWY
FIFTH AV
192 HWY
NEW HAVEN AV W
HOLLYWOOD BLVD
DAIRY RD
LIPSCOMB ST
I 95 HWY
BABCOCK ST S
MINTON RD
EBER BLVD
PIRATE LA
PALM BAY RD
PALM BAY RD NE
Legend
2000_ft_Buffer_of_DayCareCenters
2000_ft_Buffer_of_Schools
2000_ft_Buffer_of_Parks
Major Roads
City Boundary
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org
2000_Ft_Buffer_by_Category_Map.mxd
Map copy in same directory: 2000_Ft_Buffer_by_Category_Map.mxd.pdf
Created by John Struckman
City of Melbourne GIS Department
Printed at 10:28:35 AM on Jul 11, 2005


City of Melbourne
2000 Ft Buffer Map
Location in City
PINEDA CSWY
WICKHAM RD N
US 1 HWY N
SOUTH PATRICK DR
CASSIA BLVD
DESOTO PKWY
TURTLEMOUND RD
POST RD
PARKWAY DR
CROTON RD
HARBOR CITY BLVD N
STEWART RD
A1A HWY
LAKE WASHINGTON RD
I-95 HWY
AURORA RD
EAU GALLIE CSWY
EAU GALLIE BLVD E
EAU GALLIE BLVD W
JOHN RODES BLVD N
SARNO RD
APOLLO BLVD N
RIVERSIDE DR N
A1A HWY N
WICKHAM RD
APOLLO BLVD S
HARBOR CITY BLVD S
JOHN RODES BLVD
NASA BLVD W
EVANS RD
HIBISCUS BLVD W
MELBOURNE CSWY
FIFTH AV
WICKHAM RD S
192 HWY
NEW HAVEN AV W
HOLLYWOOD BLVD
DAIRY RD
BABCOCK ST S
LIPSCOMB ST
I 95 HWY
DIXIE HWY NE
EBER BLVD
PIRATE LA
MINTON RD
PALM BAY RD
PALM BAY RD NE
Legend
Buffer of Day Care Centers, Schools & Parks
Major Roads
City Boundary
2000_Ft_Buffer_Map.mxd
Map copy in same directory: 2000_Ft_Buffer_Map.mxd.pdf
Created by John Struckman
City of Melbourne GIS Department
Printed at 10:31:30 AM on Jul 11, 2005
4,700
2,350
0
4,700
9,400
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org
O


City of Melbourne
2500 Ft Buffer Map
By Category
Location in City
PINEDA CSWY
WICKHAM RD N
US 1 HWY N
POST RD
CASSIA BLVD
DESOTO PKWY
PARKWAY DR
CROTON RD
I-95 HWY
TURTLE MOUND RD
STEWART RD
A1A HWY
LAKE WASHINGTON RD
AURORA RD
EAU GALLIE BLVD E
EAU GALLIE CSWY
SARNO RD
JOHN RODES BLVD N
RIVERSIDE DR N
A1A HWY N
JOHN RODES BLVD
WICKHAM RD
WICKHAM RD S
EVANS RD
NASA BLVD E
HIBISCUS BLVD W
HIBISCUS BLVD E
MELBOURNE CSWY
FIFTH AV
192 HWY
NEW HAVEN AV W
HOLLYWOOD BLVD
DAIRY RD
BABCOCK ST S
LIPSCOMB ST
I 95 HWY
EBER BLVD
PIRATE LA
MINTON RD
PALM BAY RD
PALM BAY RD NE
Legend
2500_ft_Buffer_of_DayCareCenters
2500_ft_Buffer_of_Schools
2500_ft_Buffer_of_Parks
Major Roads
City Boundary
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org


City of Melbourne
2500 Ft Buffer Map
Location in City
PINEDA CSWY
POST RD
CASSIA BLVD
DESOTO PKWY
PARKWAY DR
LAKE WASHINGTON RD
AURORA RD
EAU GALLIE CSWY
EAU GALLIE BLVD E
EAU GALLIE BLVD W
SARNO RD
NASA BLVD W
HIBISCUS BLVD W
NEW HAVEN AV W
192 HWY
MELBOURNE CSWY
FIFTH AV
EBER BLVD
PIRATE LA
PALM BAY RD
PALM BAY RD NE
TURTLEMOUND RD
WICKHAM RD N
WICKHAM RD S
WICKHAM RD
US 1 HWY N
SOUTH PATRICK DR
A1A HWY
A1A HWY N
CROTON RD
STEWART RD
HARBOR CITY BLVD N
HARBOR CITY BLVD S
I-95 HWY
I 95 HWY
JOHN RODES BLVD N
JOHN RODES BLVD
APOLLO BLVD N
APOLLO BLVD S
RIVERSIDE DR N
EVANS RD
HOLLYWOOD BLVD
DAIRY RD
BABCOCK ST S
LIPSCOMB ST
DIXIE HWY NE
MINTON RD
Legend
Buffer of Day Care Centers, Schools & Parks
Major Roads
City Boundary
City of Melbourne
Geographic Information Systems
900 East Strawbridge Avenue
Melbourne, Florida 32901
321.727.2900 (Phone)
321.674.5743 (Fax)
Website: http://gis.melbourneflorida.org
E-mail: gis@melbourneflorida.org
O
Printed at 10:31:23 AM on Jul 11, 2005


Total Sex Predators/Offenders in Florida
Registered
28,864 Total
5,083 Predators
23,781 Offenders
Not Required to Register
Under Supervision
7,874 Total
Probation
Post Release
Sex Offender
Community Control
Drug Offender
Unsupervised
12,573 Total
Released from Sanctions
Offense occurred outside Florida
Incarcerated /Civilly Committed
8,417 Total
Predators & some Offenders
DC Defined as Sex Offenders
Offense committed prior to registration requirements

C

Florida Department of Corrections

Presentation
House Judiciary Committee

December 7, 2005

James V. Crosby, Jr., Secretary
Jeb Bush, Governor

What is community supervision?

Community Supervision – The monitoring of offenders placed on supervision to enforce conditions of supervision imposed by the sentencing authority. Offenders are supervised in the community or monitored for a specified duration in a residential treatment program.

Types of Supervision

- Probation
- Post- Release
- Sex Offender
- Community Control
- Drug Offender Probation

Supervision Strategies

- Field supervision and surveillance
- Residence checks to ensure compliance with conditions
- Employment checks to notify and verify employment and ensure compliance with conditions
- Walk though visual inspections to view items in plain sight
- Contacts with family, employers, treatment providers, and significant others to obtain information regarding offender's activities
- Searches of residence, person, vehicle
- Computer/internet searches

Supervision Strategies

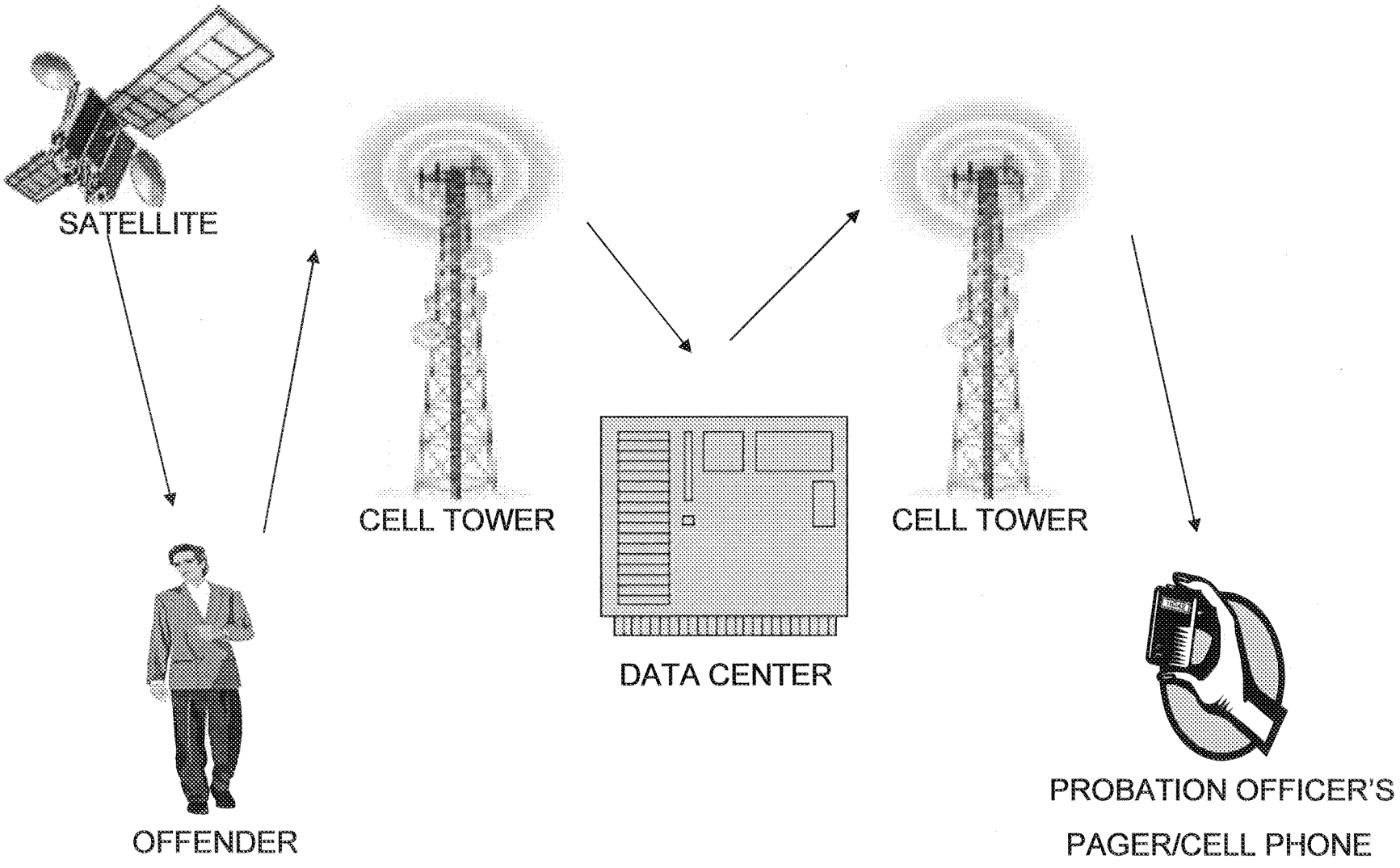
- Curfew compliance checks
- Victim Notification for No Contact
- Drug testing
- Monitoring compliance with substance abuse treatment
- Monitoring compliance with mental health/sex offender treatment
- Residential Drug Treatment
- Warrantless Arrests
- Electronic monitoring (Active GPS – view tracking points for offender location data)

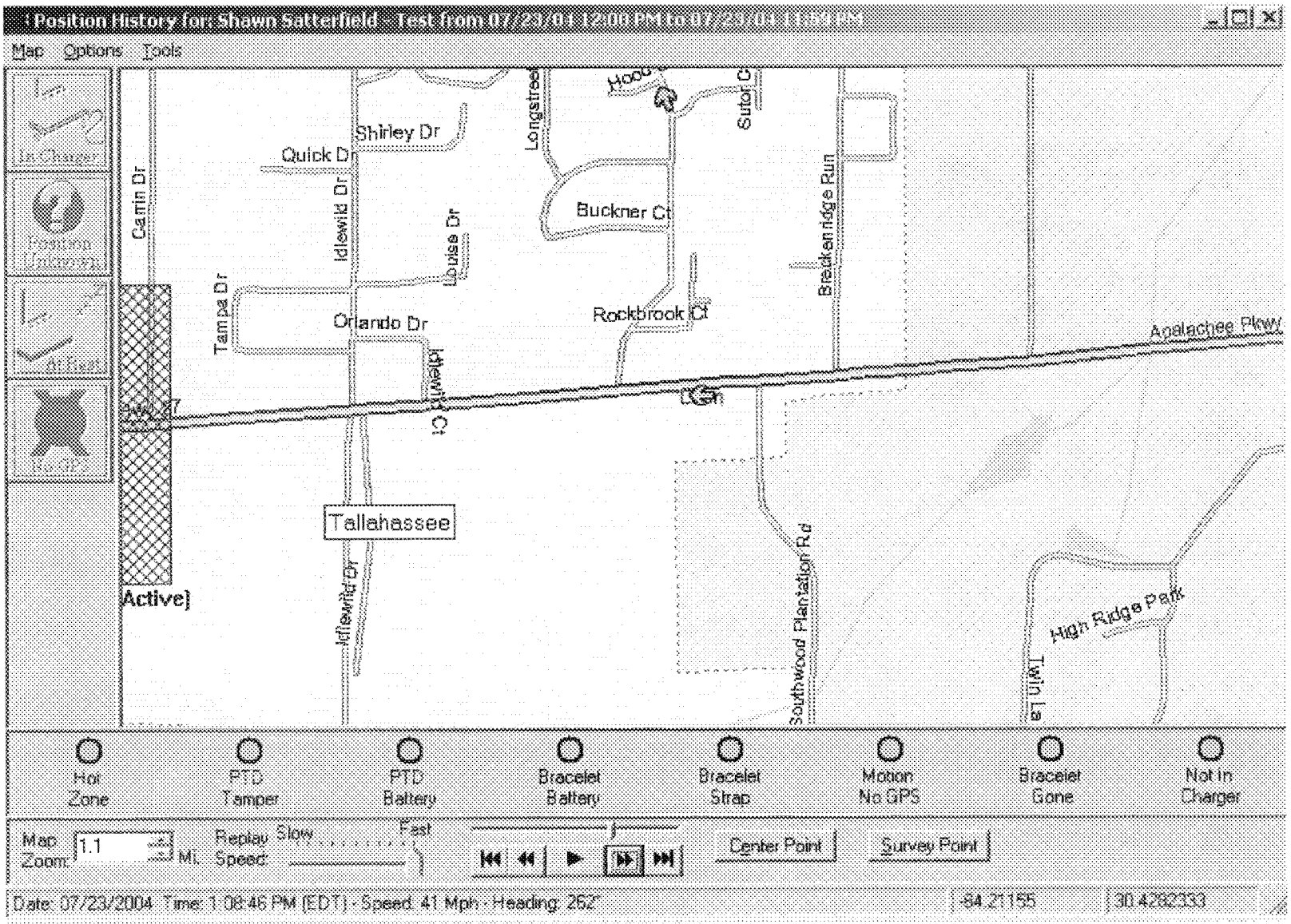
Types of electronic monitoring equipment

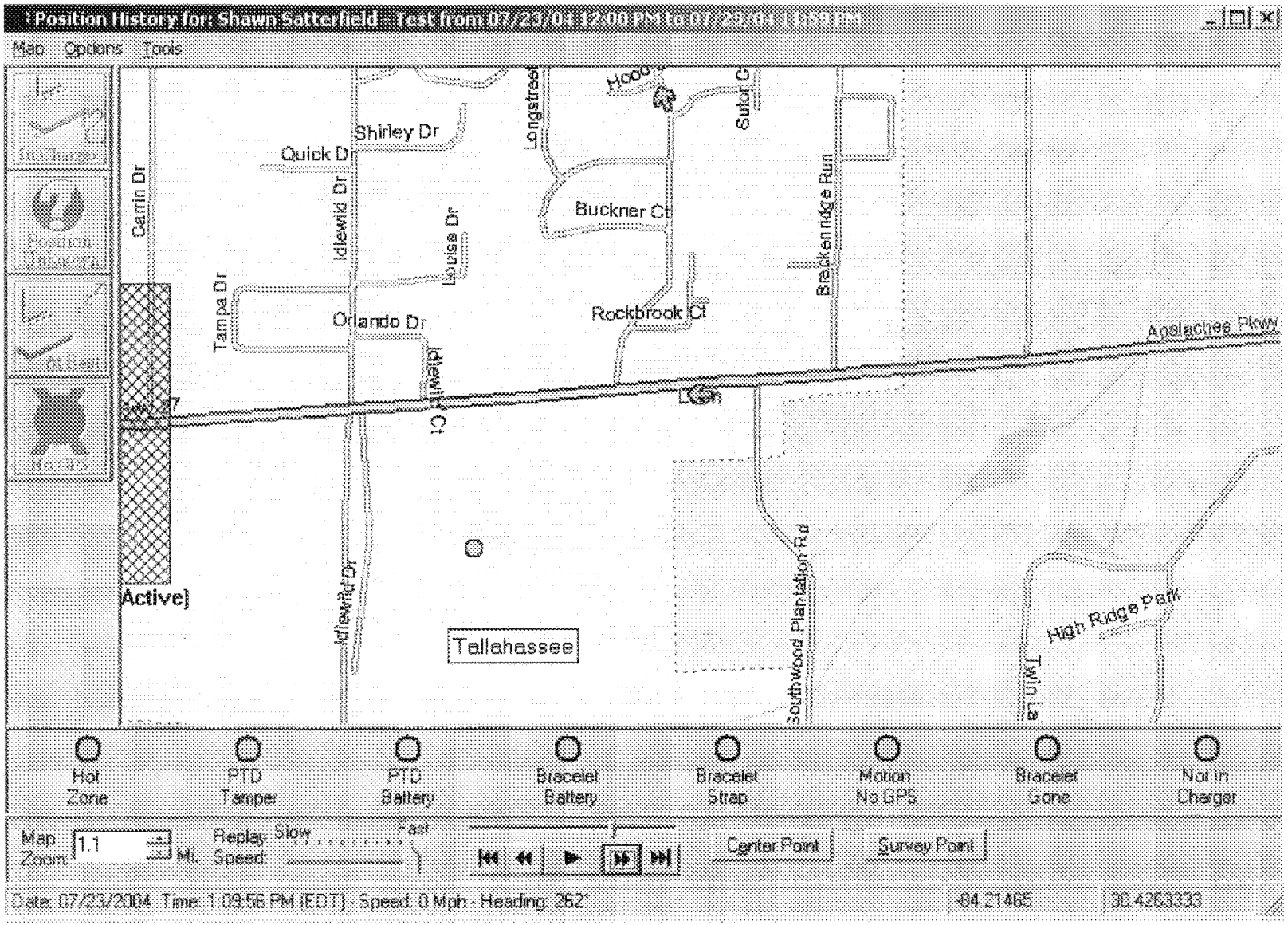
- Radio Frequency – Determines the offenders absence or presence from their residence.
  $1.97 per unit day.
- Passive GPS – Records offender locations and any violations, reports the next day.
  $4.25 per unit day.
- Active GPS – Near real time reporting of offender locations and any violations.

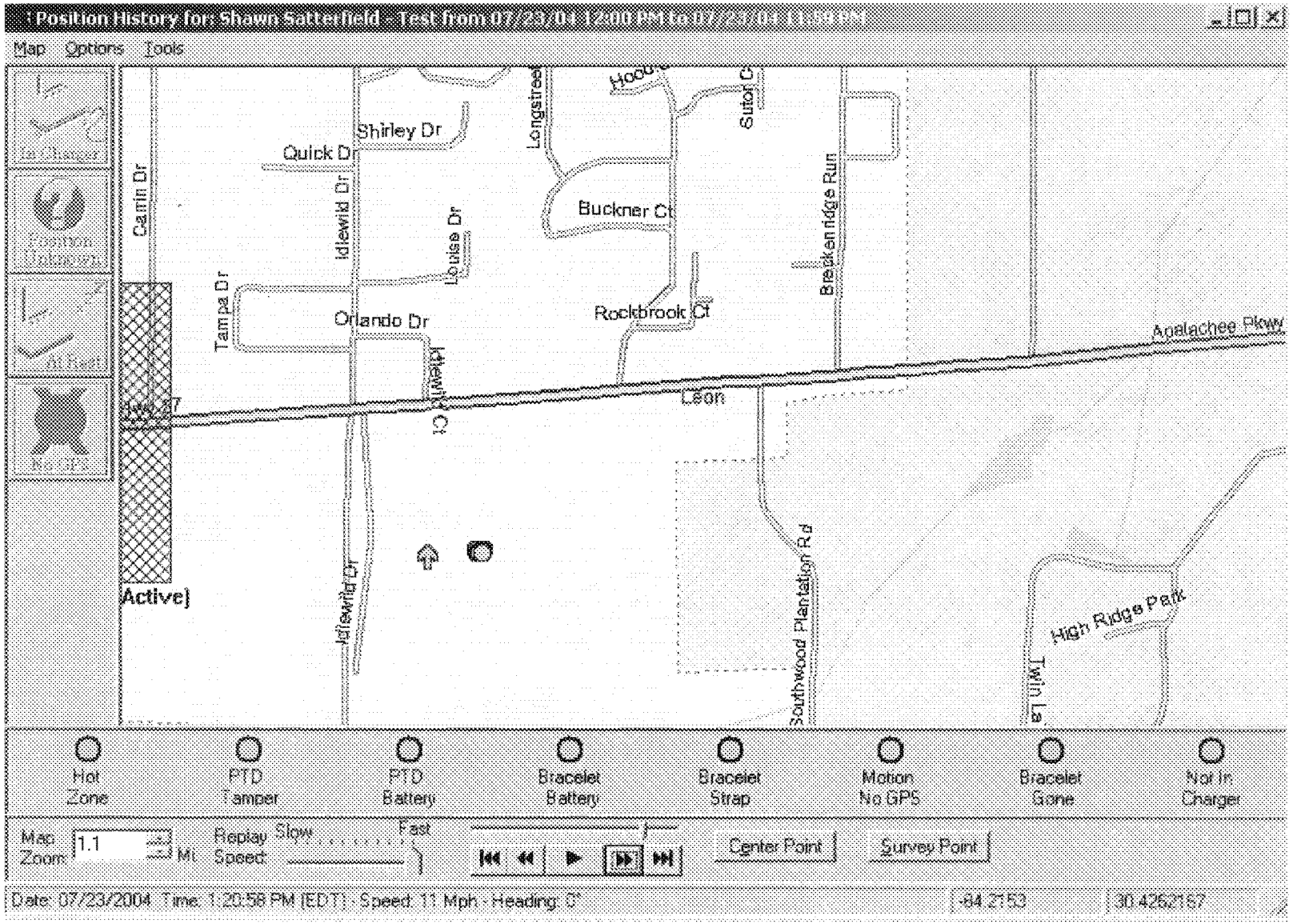
  $6.47 to $8.97 per unit day.

ACTIVE GPS MONITORING PROCESS

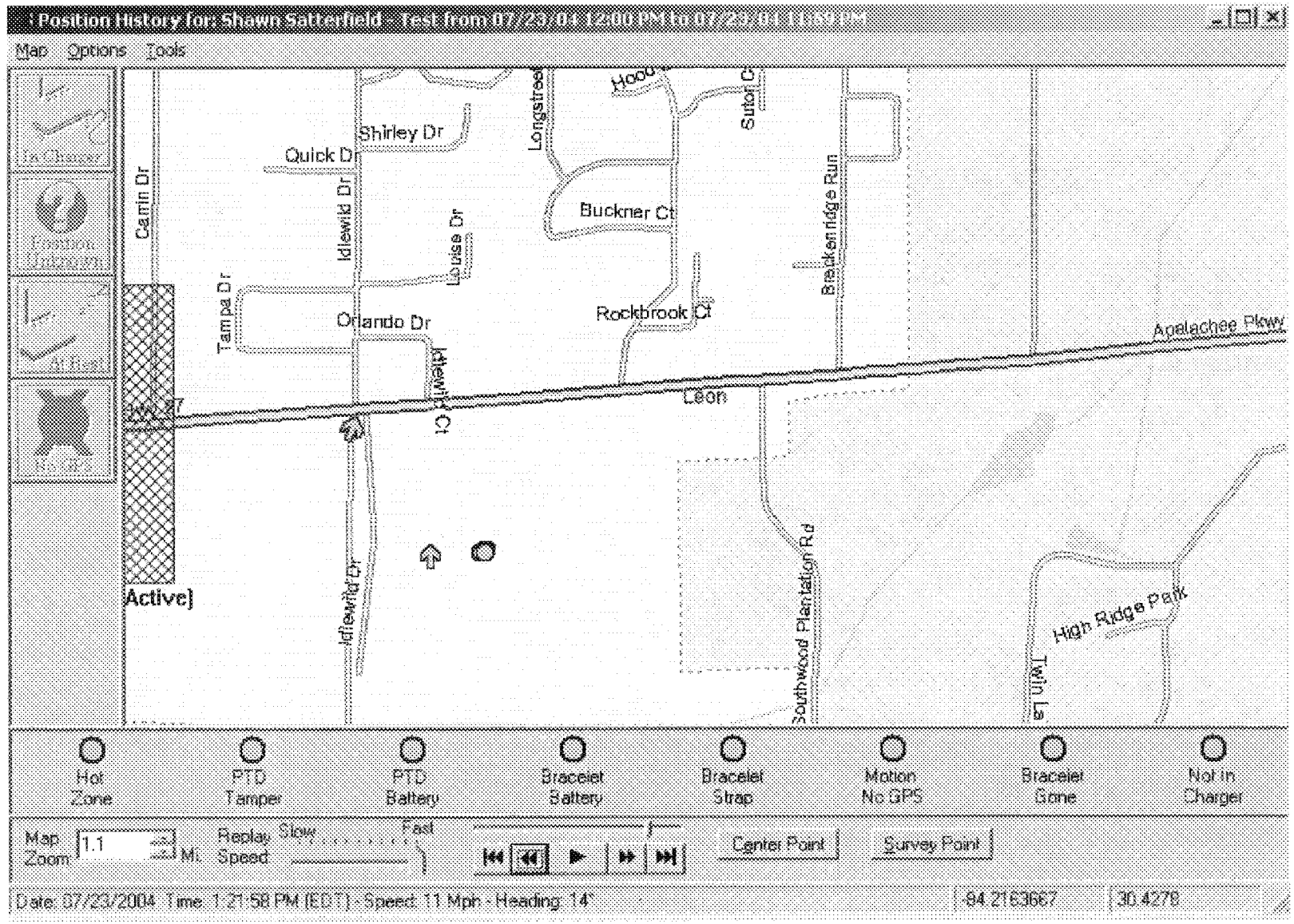



Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:09 PM
Map Options Tools
Shirley Dr
Quick Dr
Idlewild Dr
Louise Dr
Tampa Dr
Orlando Dr
Camin Dr
Longstreet
Hood
Sutor Ct
Buckner Ct
Rockbrook Ct
Breakenridge Run
Apalachee Pkwy
Idlewild Ct
Tallahassee
Idlewild Dr
Active]
Southwood Plantation Rd
High Ridge Park
Lamb Ln
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom:
1.1
Mi
Replay Speed:
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:08:46 PM (EDT) - Speed: 41 Mph - Heading: 262°
-84.21155
30.4262333

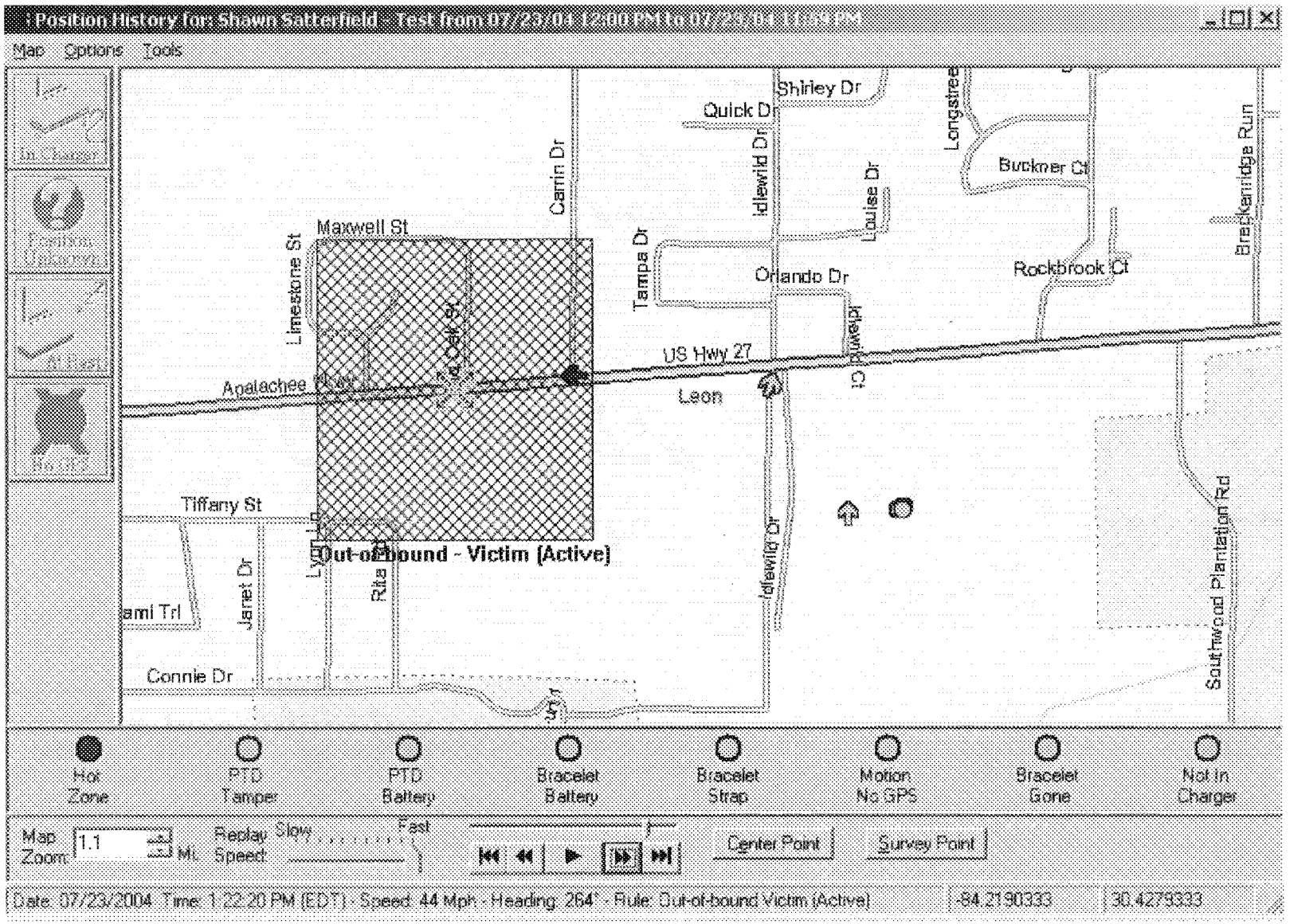

Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:09 PM
Map Options Tools
Shirley Dr
Quick Dr
Idlewild Dr
Louise Dr
Tampa Dr
Orlando Dr
Idlewild Ct
Longstreet
Hood
Sutor Ct
Buckner Ct
Rockbrook Ct
Breckenridge Run
Apalachee Pkwy
Tallahassee
Southwood Plantation Rd
High Ridge Park
Twin La
Active]
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
Mi.
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:09:56 PM (EDT) - Speed: 0 Mph - Heading: 262°
-84.21465
30.4263333

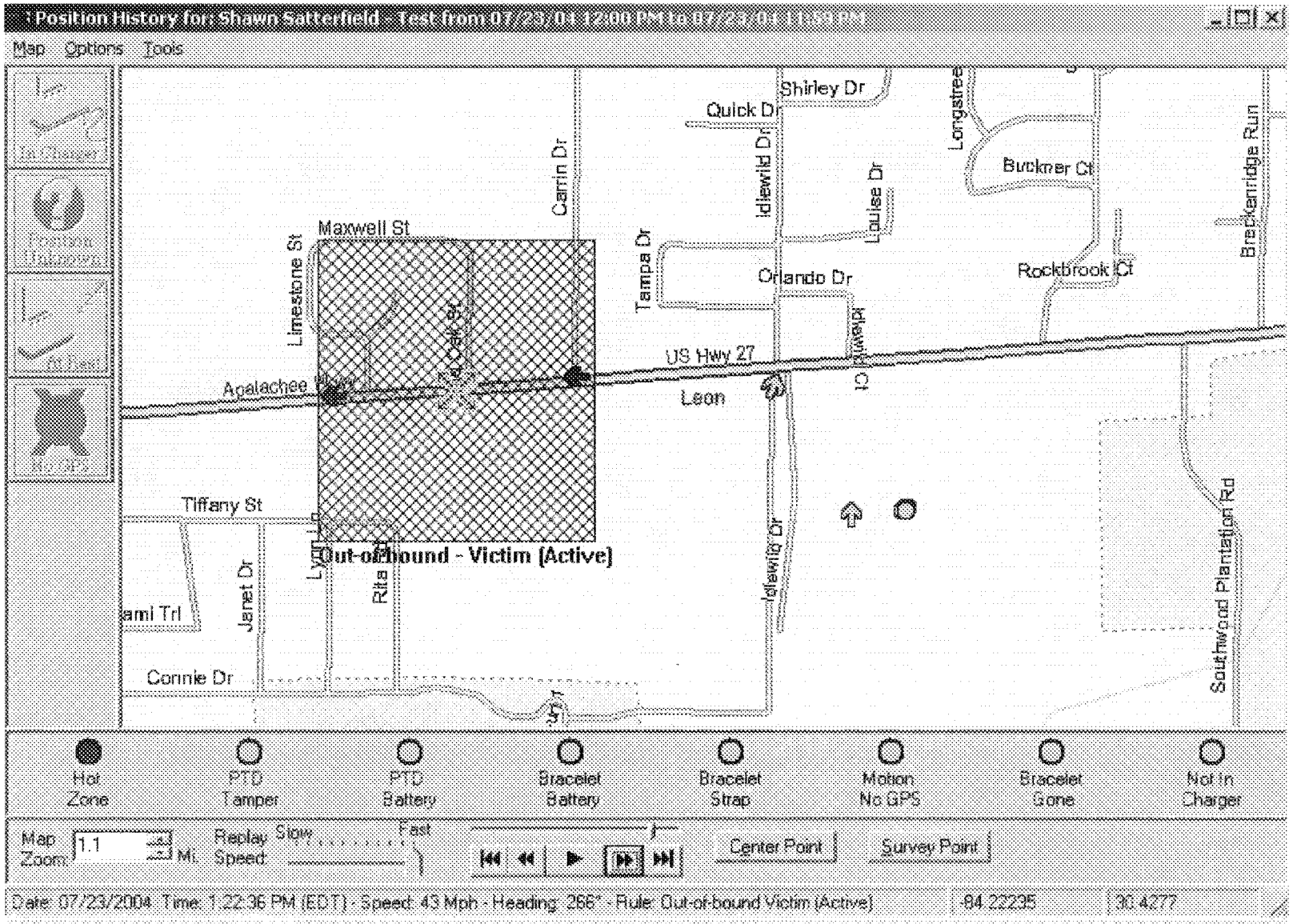

Position History for: Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 11:59 PM
Map Options Tools
Shirley Dr
Quick Dr
Camin Dr
Idlewild Dr
Louise Dr
Tampa Dr
Orlando Dr
Longstreet
Buckner Ct
Rockbrook Ct
Breakenridge Run
Suton Ct
Apalachee Pkwy
Leon
Idlewild Ct
Idlewild Dr
Active]
Southwood Plantation Rd
High Ridge Path
Twin Ln
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom: 1.1 Mi
Replay Speed: Slow Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:20:58 PM (EDT) - Speed: 11 Mph - Heading: 0°
-84.2153
30.4252167

54

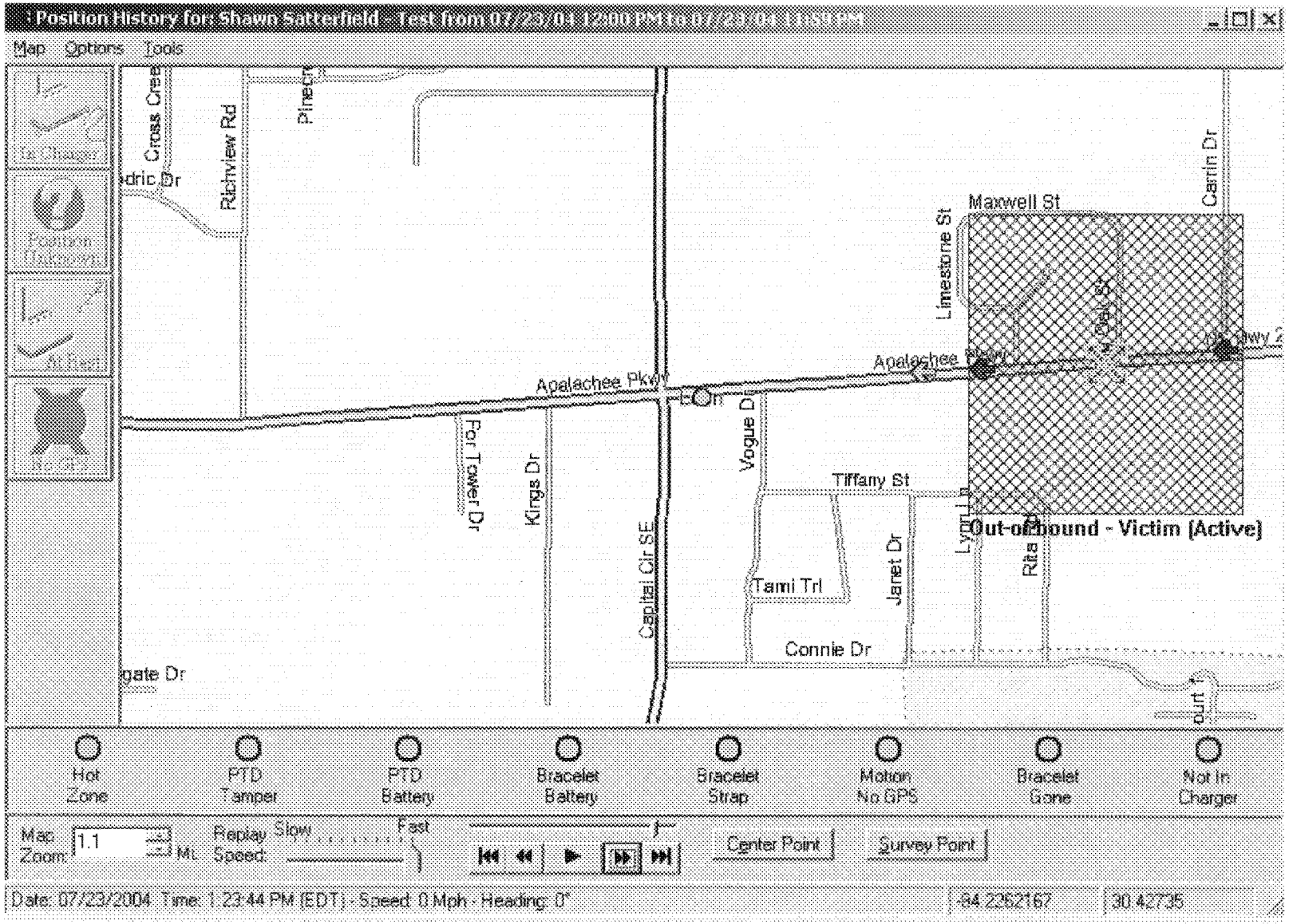

Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:59 PM
Map Options Tools
Shirley Dr
Quick D
Idlewild Dr
Camlin Dr
Tampa Dr
Orlando Dr
Louise Dr
Longstreet
Buckner Ct
Rockbrook Ct
Breckenridge Run
Sutton Ct
Apalachee Pkwy
Leon
Idlewild Ct
Idlewild Dr
Active]
Southwood Plantation Rd
High Ridge Park
Twin Ln
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
1.1
Mi
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:21:58 PM (EDT) - Speed: 11 Mph - Heading: 14°
-84.2163667
30.4278

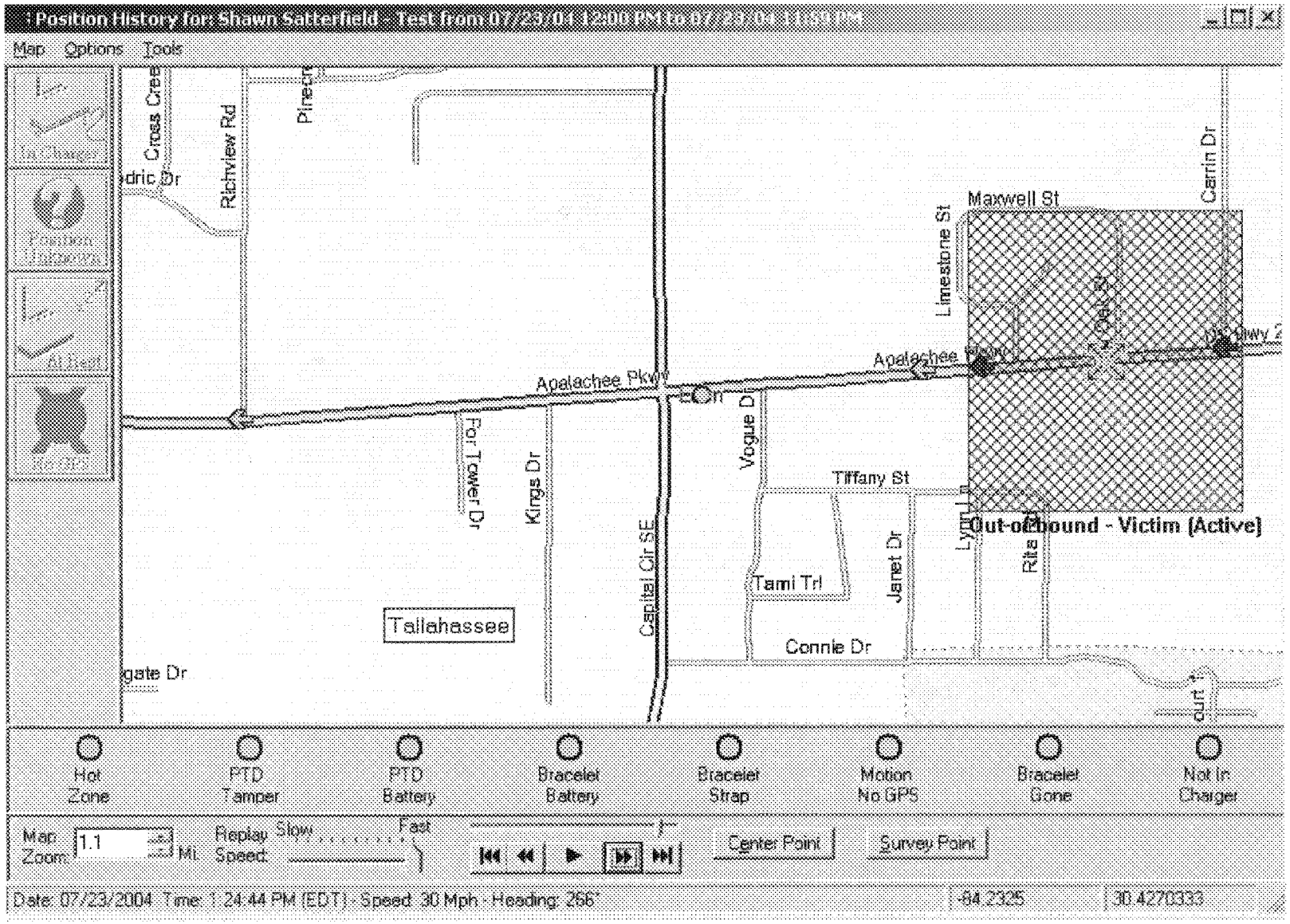
55

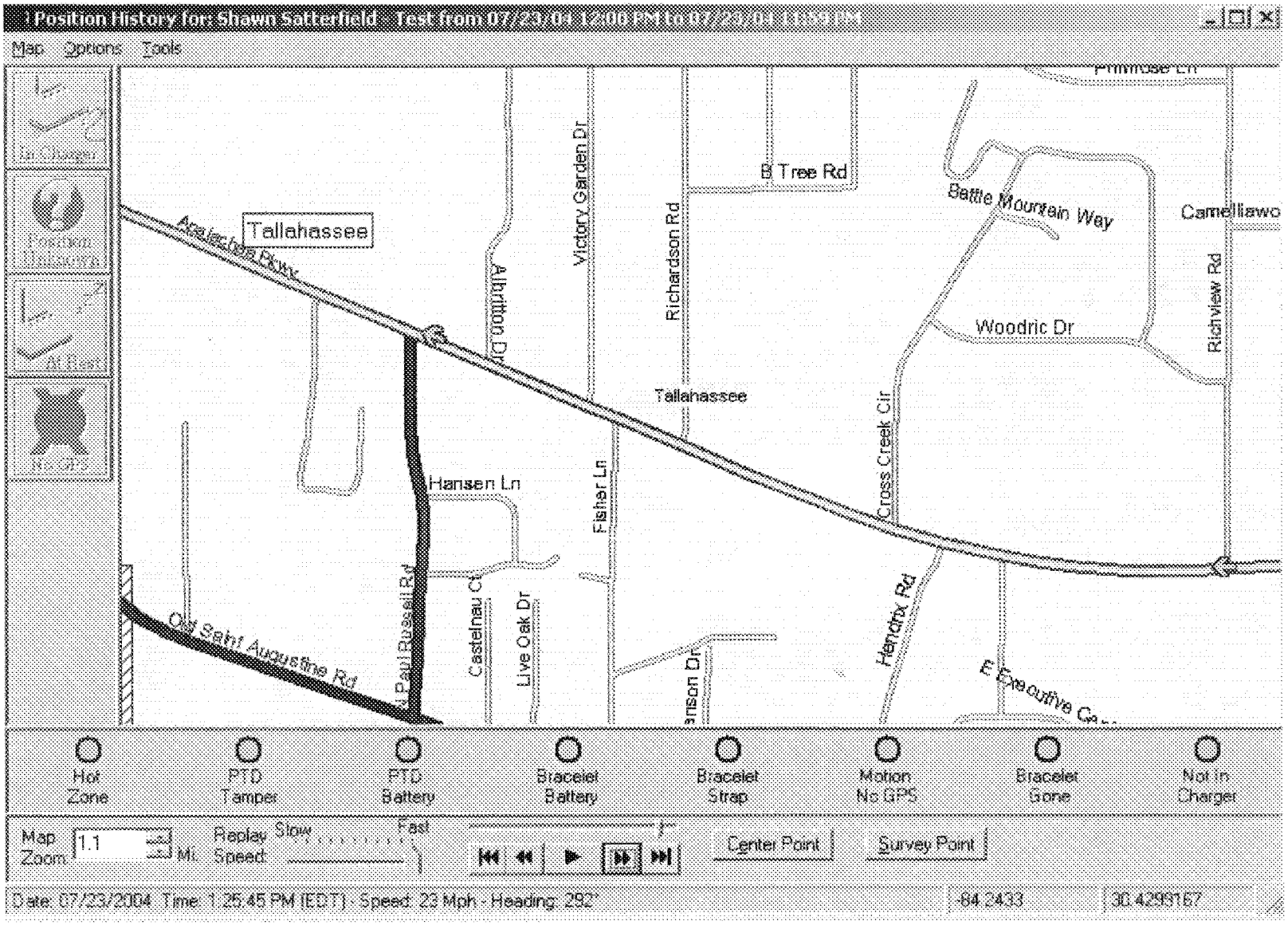

Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 11:59 PM
Map Options Tools
Shirley Dr
Quick Dr
Idlewild Dr
Carrin Dr
Louise Dr
Longstreet
Buckner Ct
Breckenridge Run
Maxwell St
Limestone St
Tampa Dr
Orlando Dr
Rockbrook Ct
Idlewild Dr
US Hwy 27
Apalachee Pkwy
Leon
Tiffany St
Out-of-bound - Victim (Active)
Janet Dr
Rita Dr
Connie Dr
Southwood Plantation Rd
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
1.1
Mi
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:22:20 PM (EDT) - Speed: 44 Mph - Heading: 264° - Rule: Out-of-bound Victim (Active)
-84.2190333
30.4279333

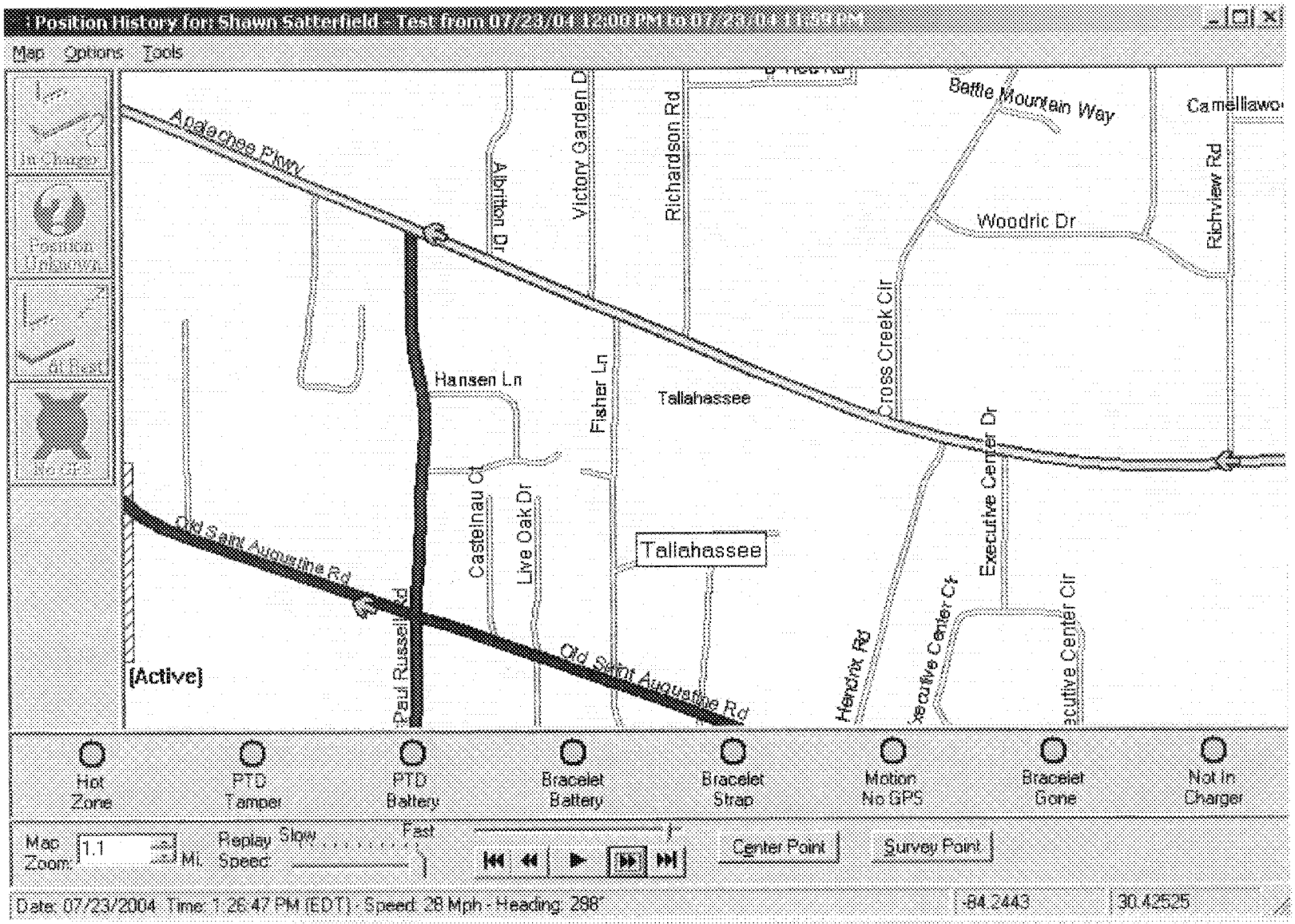

Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:59 PM
Map Options Tools
Shirley Dr
Quick Dr
Idlewild Dr
Carrin Dr
Longstreet
Buckner Ct
Brookbridge Run
Louise Dr
Maxwell St
Limestone St
Tampa Dr
Orlando Dr
Rockbrook Ct
Idlewild Ct
US Hwy 27
Leon
Apalachee Pkwy
Tiffany St
Out-of-bound - Victim (Active)
Janet Dr
Rita
Connie Dr
Idlewild Dr
Southwood Plantation Rd
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
1.1
Mi.
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:22:36 PM (EDT) - Speed: 43 Mph - Heading: 266° - Rule: Out-of-bound Victim (Active)
-84.22235
30.4277

5

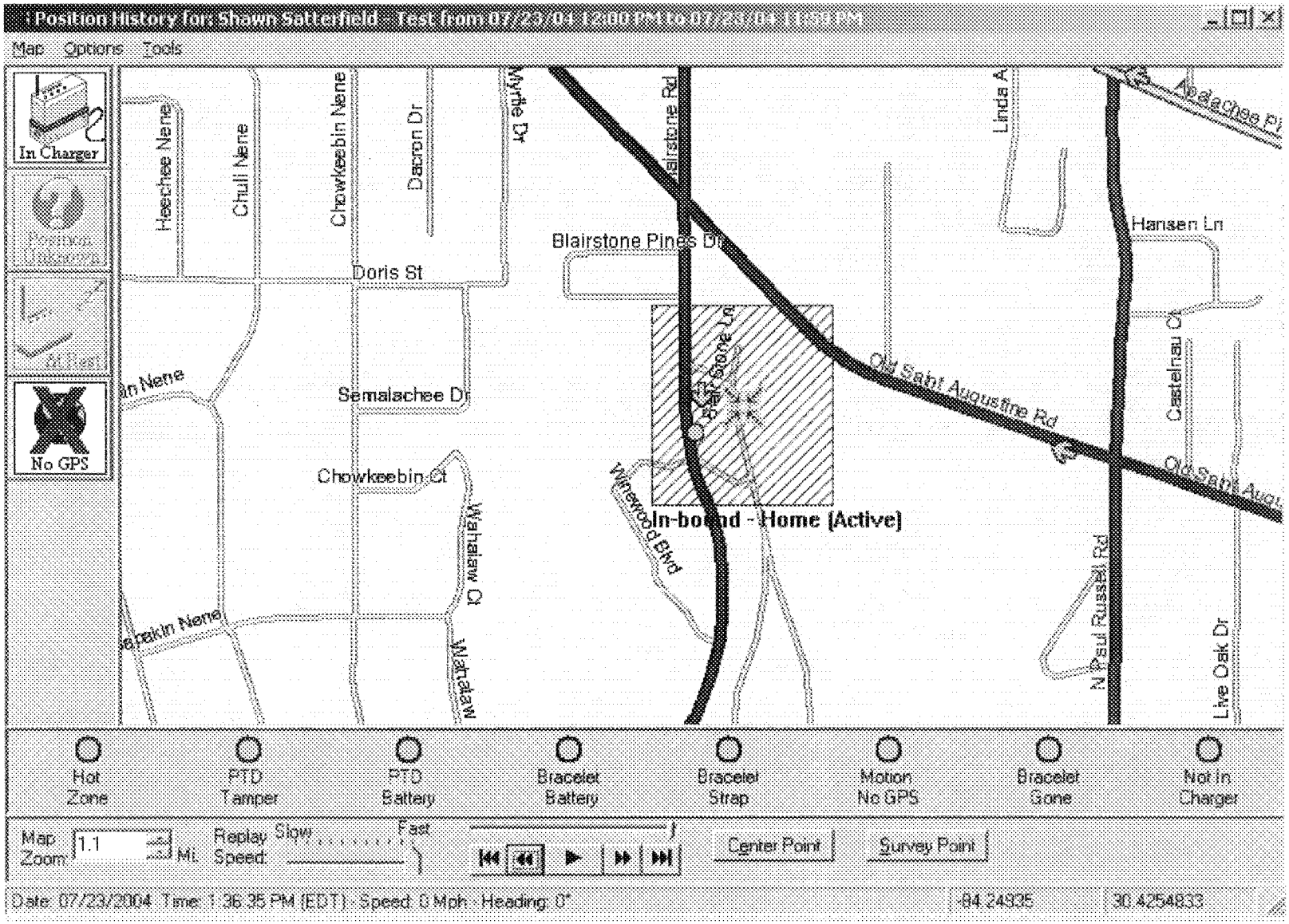

Position History for: Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 11:59 PM
Map Options Tools
Richview Rd
Maxwell St
Limestone St
Carrin Dr
Apalachee Pkwy
Vogue Dr
Tiffany St
For Tower Dr
Kings Dr
Capital Cir SE
Tami Trl
Janet Dr
Connie Dr
Rita
Out-of-bound - Victim (Active)
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom:
Mi
Replay Speed:
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:23:44 PM (EDT) - Speed: 0 Mph - Heading: 0°
-84.2262167
30.42735


Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:30 PM
Map Options Tools
Cross Creek
Richview Rd
Pinedale
Maxwell St
Carrin Dr
Limestone St
Apalachee Pkwy
Vogue Dr
Tiffany St
Out-of-bound - Victim (Active)
Kings Dr
Capital Cir SE
Tami Trl
Janet Dr
Connie Dr
Tallahassee
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom: 1.1 Mi
Replay Speed: Slow Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:24:44 PM (EDT) - Speed: 30 Mph - Heading: 256°
-84.2325
30.4270333

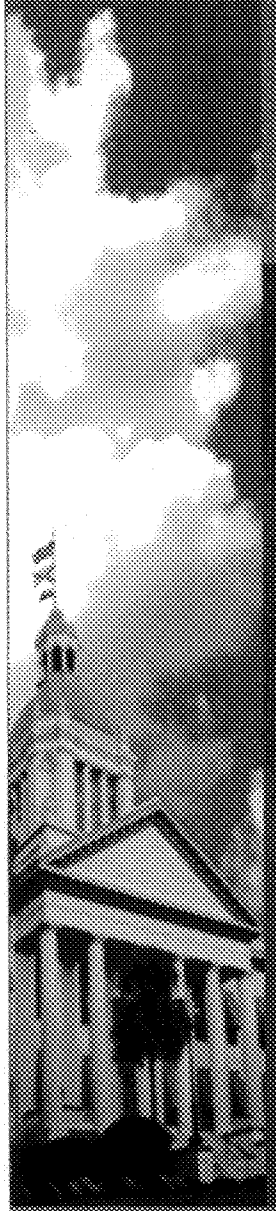

Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 11:59 PM
Map Options Tools
Tallahassee
Apalachee Pkwy
Victory Garden Dr
Richardson Rd
B Tree Rd
Battle Mountain Way
Woodric Dr
Richview Rd
Cross Creek Cir
Fisher Ln
Hansen Ln
Old Saint Augustine Rd
N Paul Russell Rd
Live Oak Dr
Hendrix Rd
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
Mi
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:25:45 PM (EDT) - Speed: 23 Mph - Heading: 292°
-84.2433
30.429917


Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:59:59 PM
Map Options Tools
Appalachee Pkwy
Albritton Dr
Victory Garden Dr
Richardson Rd
Battle Mountain Way
Woodric Dr
Richview Rd
Cross Creek Cir
Executive Center Dr
Executive Center Cir
Executive Center Cir
Hansen Ln
Fisher Ln
Tallahassee
Castelnau Ct
Live Oak Dr
Tallahassee
Old Saint Augustine Rd
Paul Russell Rd
Old Saint Augustine Rd
Hendrix Rd
[Active]
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom:
1.1
Mi
Replay Speed:
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:26:47 PM (EDT) Speed: 28 Mph - Heading: 286°
-84.2443
30.42525

6


Position History for Shawn Satterfield - Test from 07/23/04 12:00 PM to 07/23/04 1:00 PM
Map Options Tools
In Charger
No GPS
Heechee Nene
Chuli Nene
Chowkeebin Nene
Dacron Dr
Myrtle Dr
Doris St
Blairstone Rd
Blairstone Pines Dr
Linda A
Hansen Ln
Castelnau Ct
Old Saint Augustine Rd
Semalachee Dr
Chowkeebin Ct
Wahalaw Ct
Wahalaw
Winewood Blvd
N Paul Russell Rd
Live Oak Dr
In-bound - Home (Active)
Hot Zone
PTD Tamper
PTD Battery
Bracelet Battery
Bracelet Strap
Motion No GPS
Bracelet Gone
Not In Charger
Map Zoom
1.1
Mi
Replay Speed
Slow
Fast
Center Point
Survey Point
Date: 07/23/2004 Time: 1:36:35 PM (EDT) - Speed: 0 Mph - Heading: 0°
-84.24935
30.4254833

oppaga



The Geographic Impact of Residency Restrictions on Sex Offenders and Use of Electronic Monitoring

Richard Dolan
Senior Legislative Analyst

Michelle Harrison
Jason Gaitanis
Legislative Analysts

December 7, 2005

Topics for Discussion

- Effect of sex offender residence restrictions
- Sex offenders in the community, both supervised and unsupervised

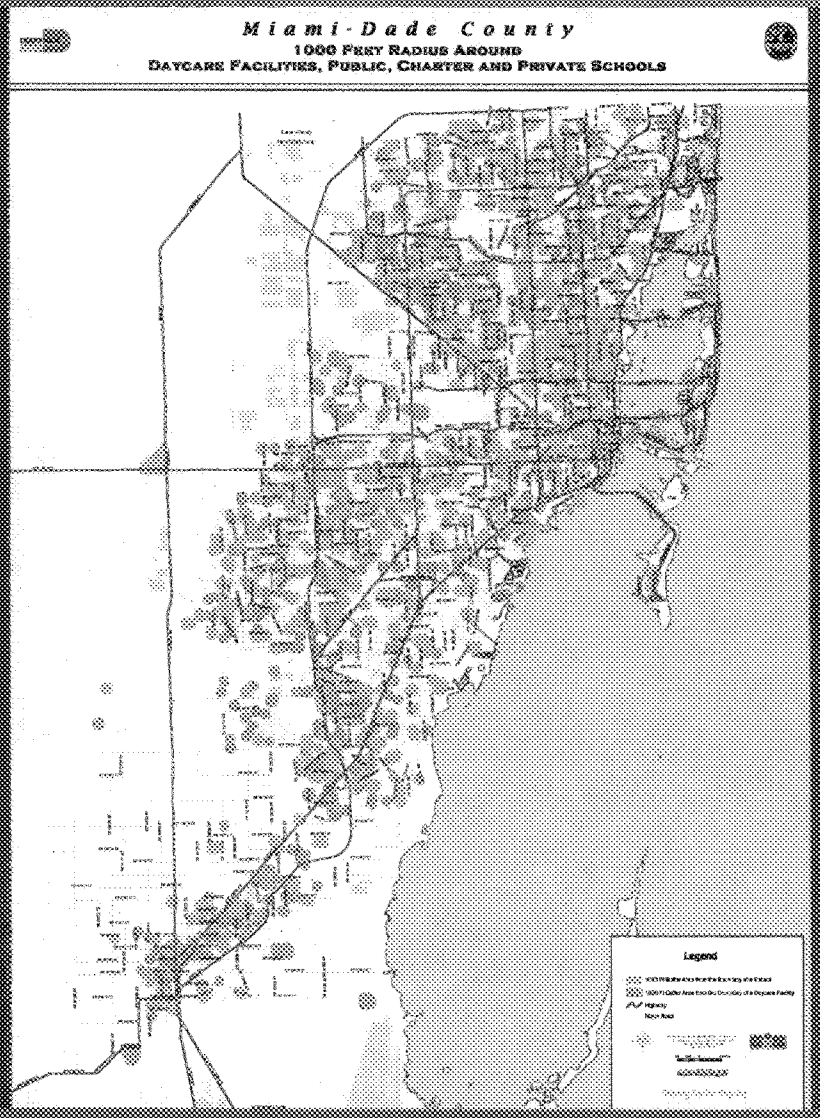
Data Sources

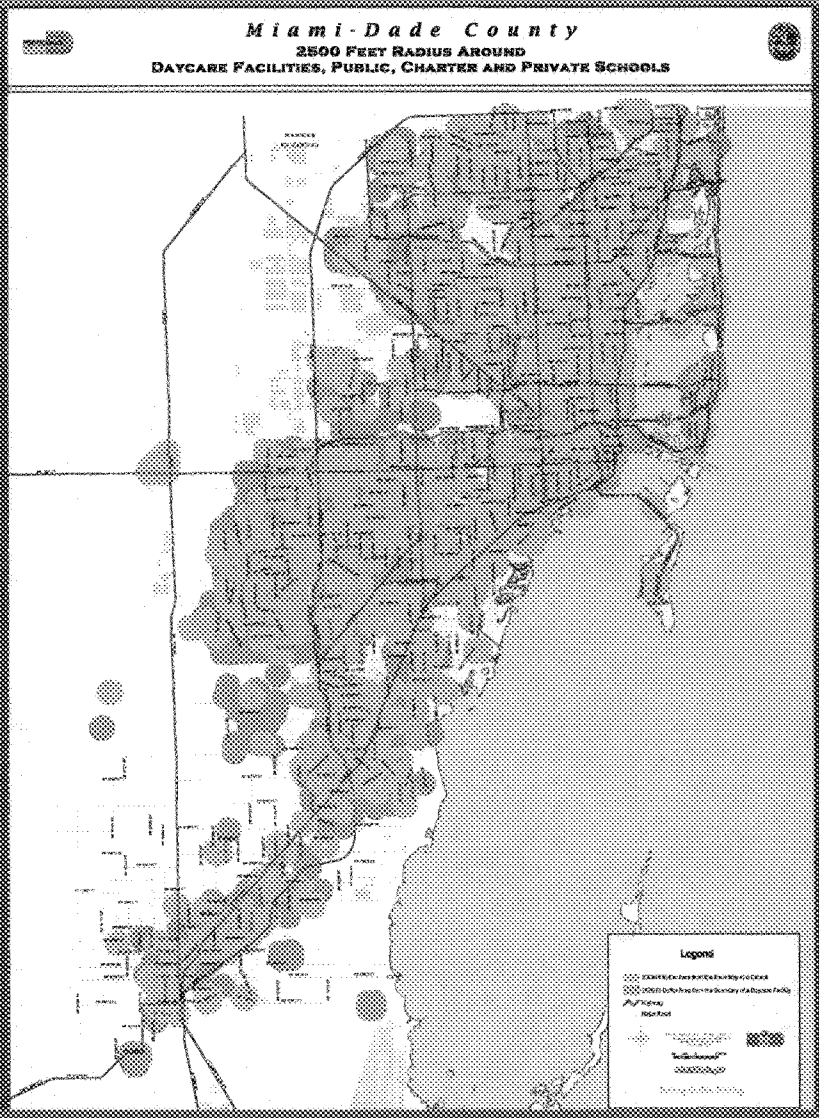
- Supervised population – Department of Corrections data - primary conviction offense, type of supervision, and electronic monitoring status for 116,749 offenders (sexual and non-sexual) on community supervision on 12/24/04
- Non-supervised population– FDLE Sex Offender Registry data for 11,317 offenders on 11/7/05
- Residence restriction – GIS data from 4 communities

Residence Restrictions

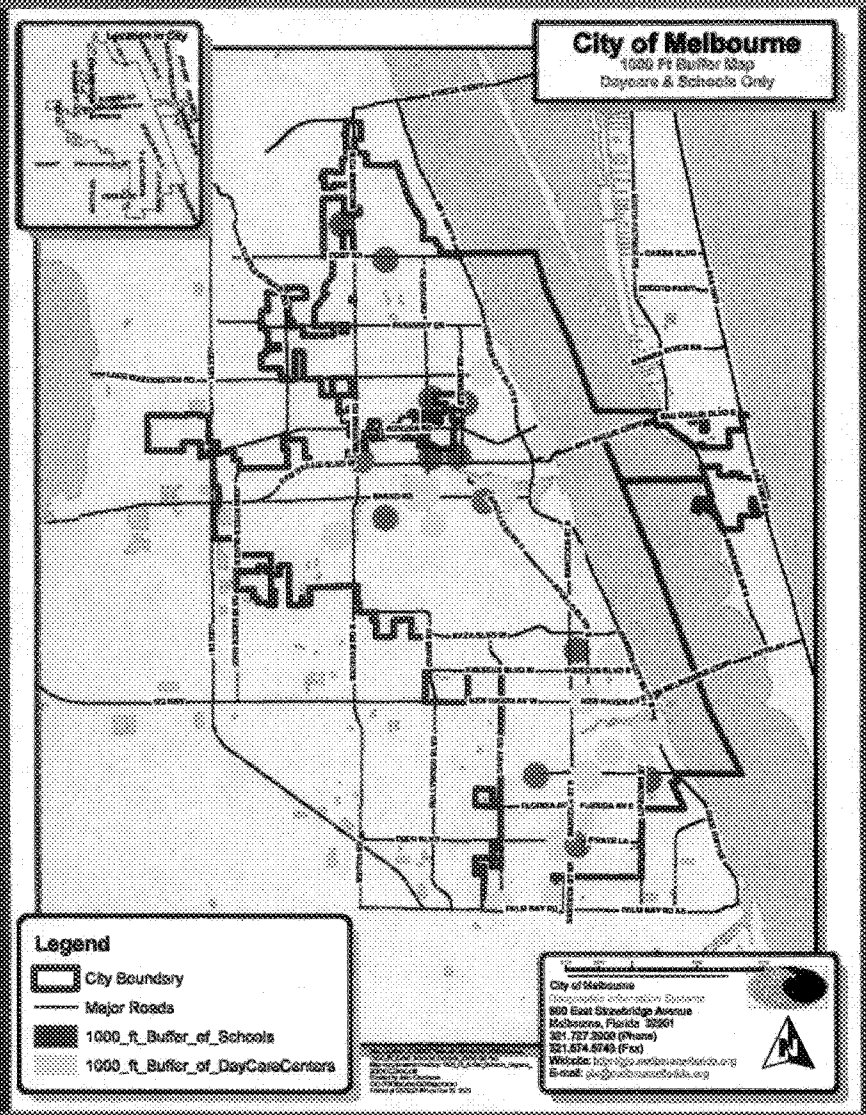
- Examined the difference between 1,000 & 2,500 foot restrictions from schools and day cares
- Compared large, medium and small communities

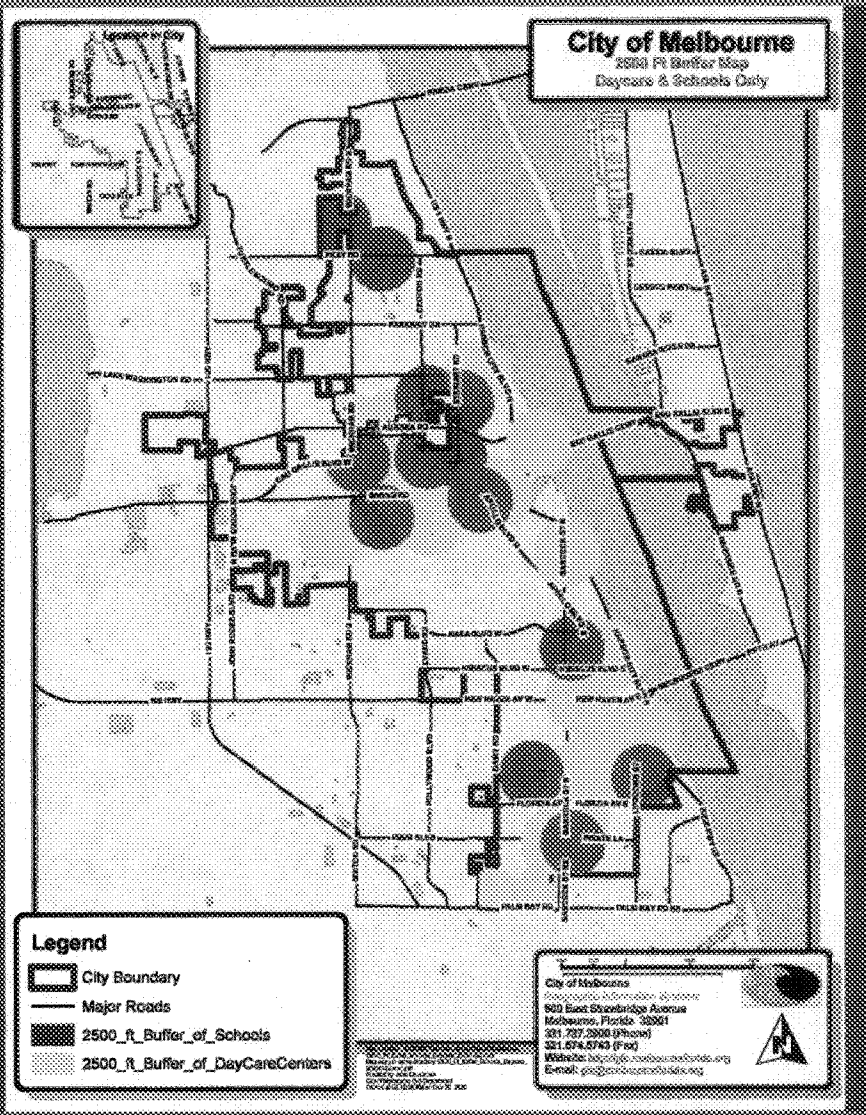
Miami-Dade


Miami-Dade County
1000 Feet Radius Around
Daycare Facilities, Public, Charter and Private Schools
Legend


Miami-Dade County
2500 Feet Radius Around
Daycare Facilities, Public, Charter and Private Schools
Legend

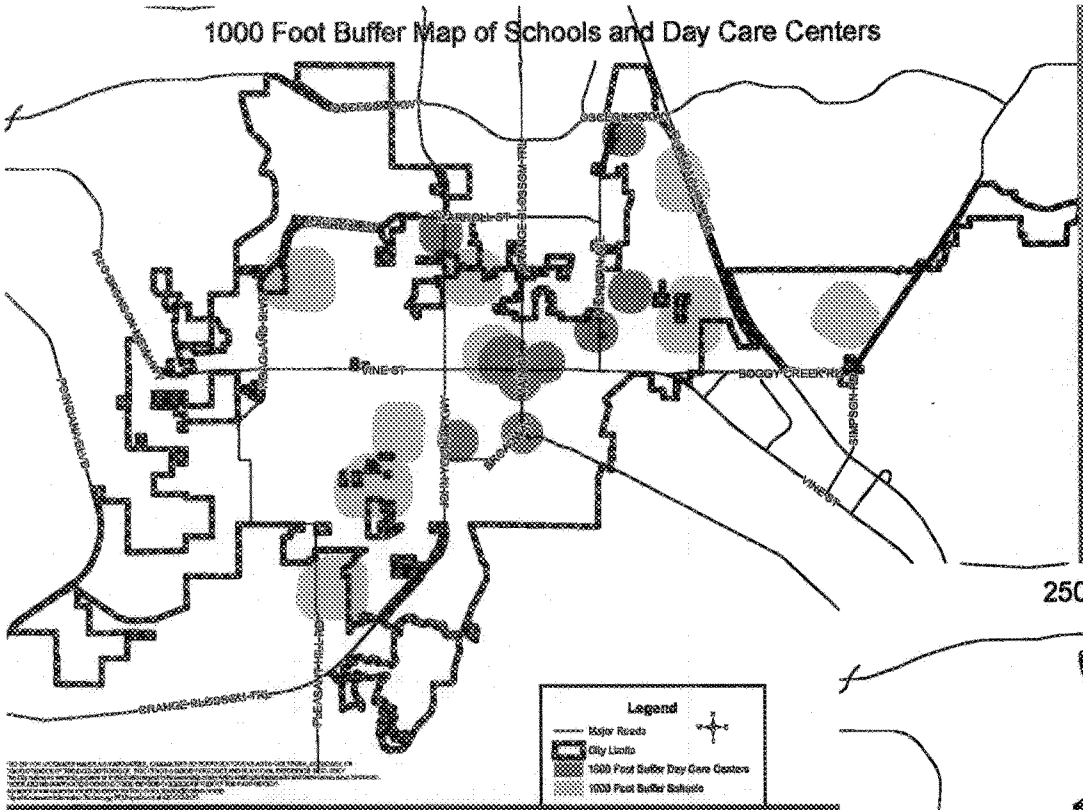
City of Melbourne



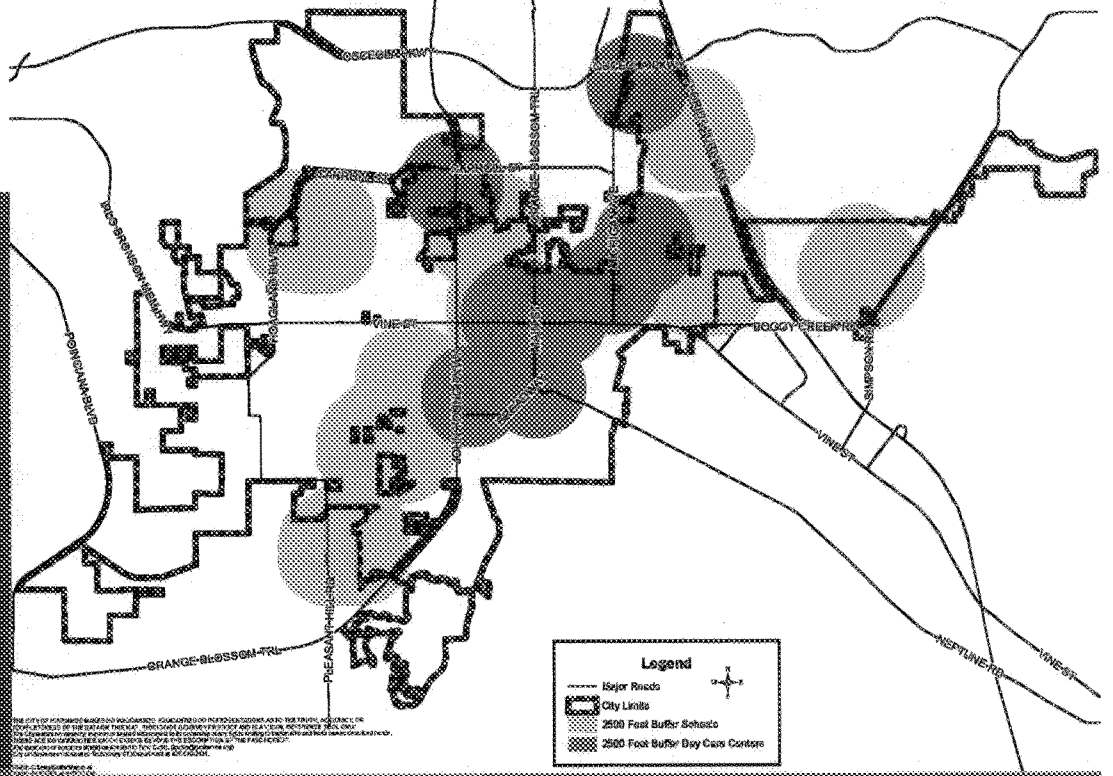


City of Kissimmee

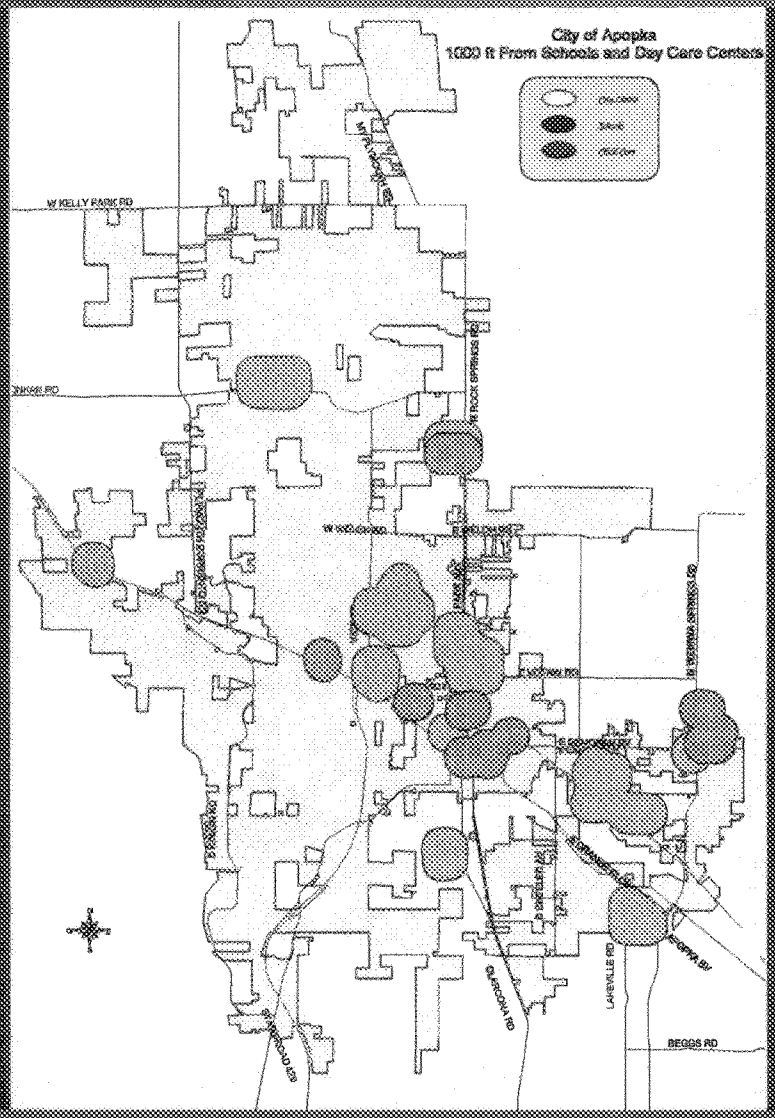
1000 Foot Buffer Map of Schools and Day Care Centers

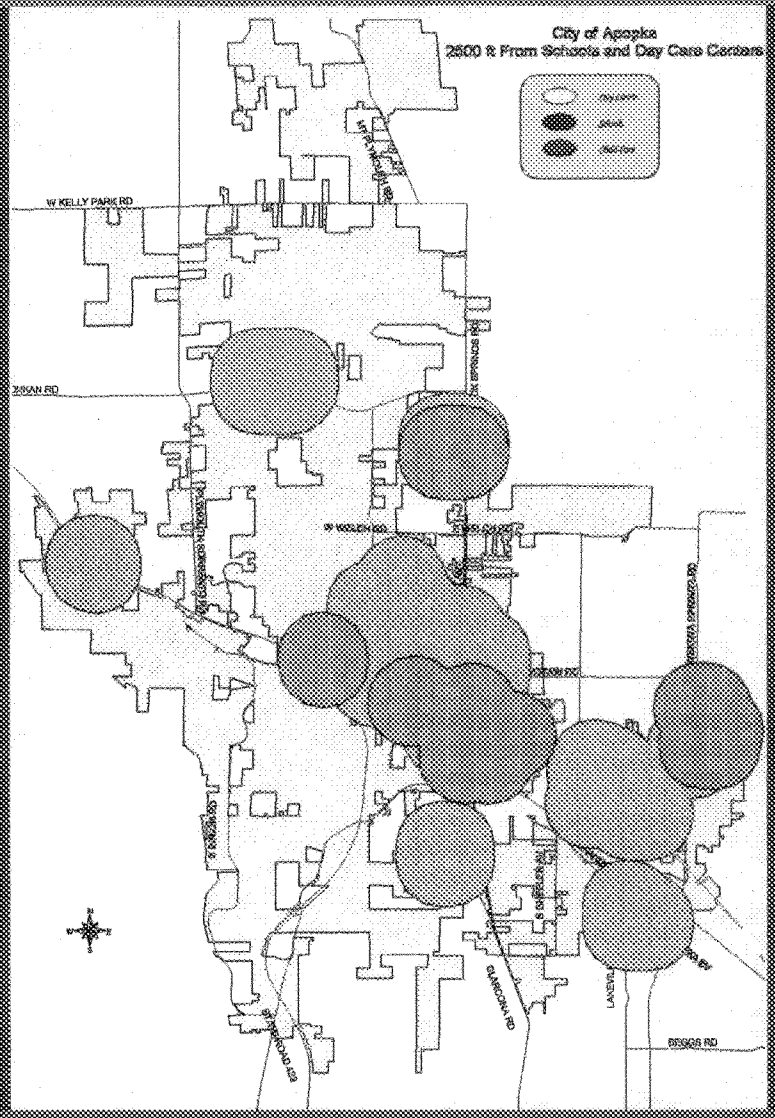


2500 Foot Buffer Map of Schools and Day Care Centers



City of Apopka





Questions?

Sex offenders and Where They Live

Group A – Total sex offenders in the community

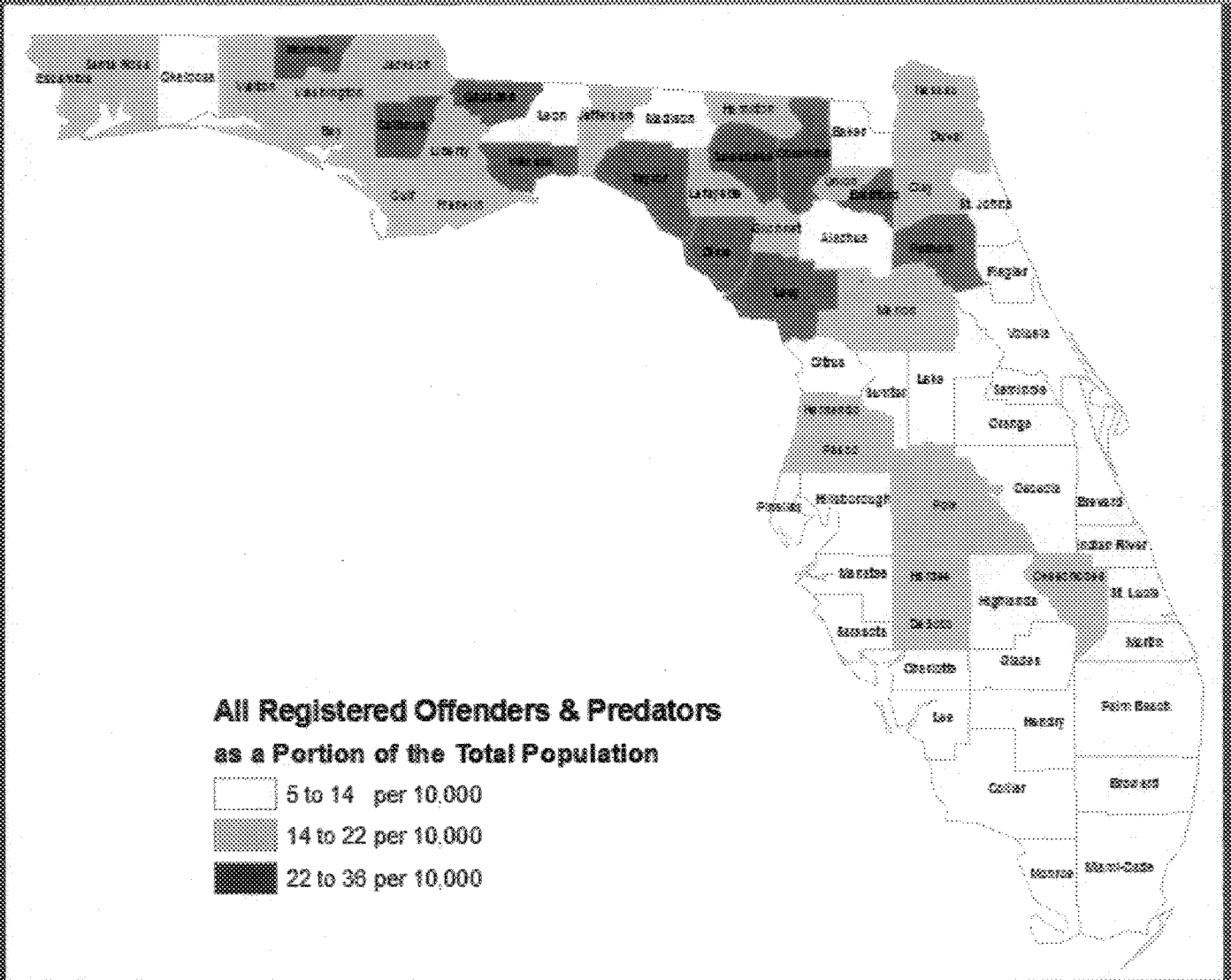
1. Total supervised and unsupervised sex predators and offenders (FDLE Registry Data)
2. Total unsupervised sex predators and offenders (FDLE Registry Data)
3. Total unsupervised sex predators (FDLE Registry Data)
4. Total unsupervised sex offenders (FDLE Registry Data)
5. Violent sex offenders - both adult and child victims (DOC Data)

Group B – Supervised sex offenders of children (DOC Data)

1. Total supervised offenders with child victim
2. Lewd and Lascivious with child victim
3. Sexual battery, violent sex offenders with child victims – "worst of the worst"

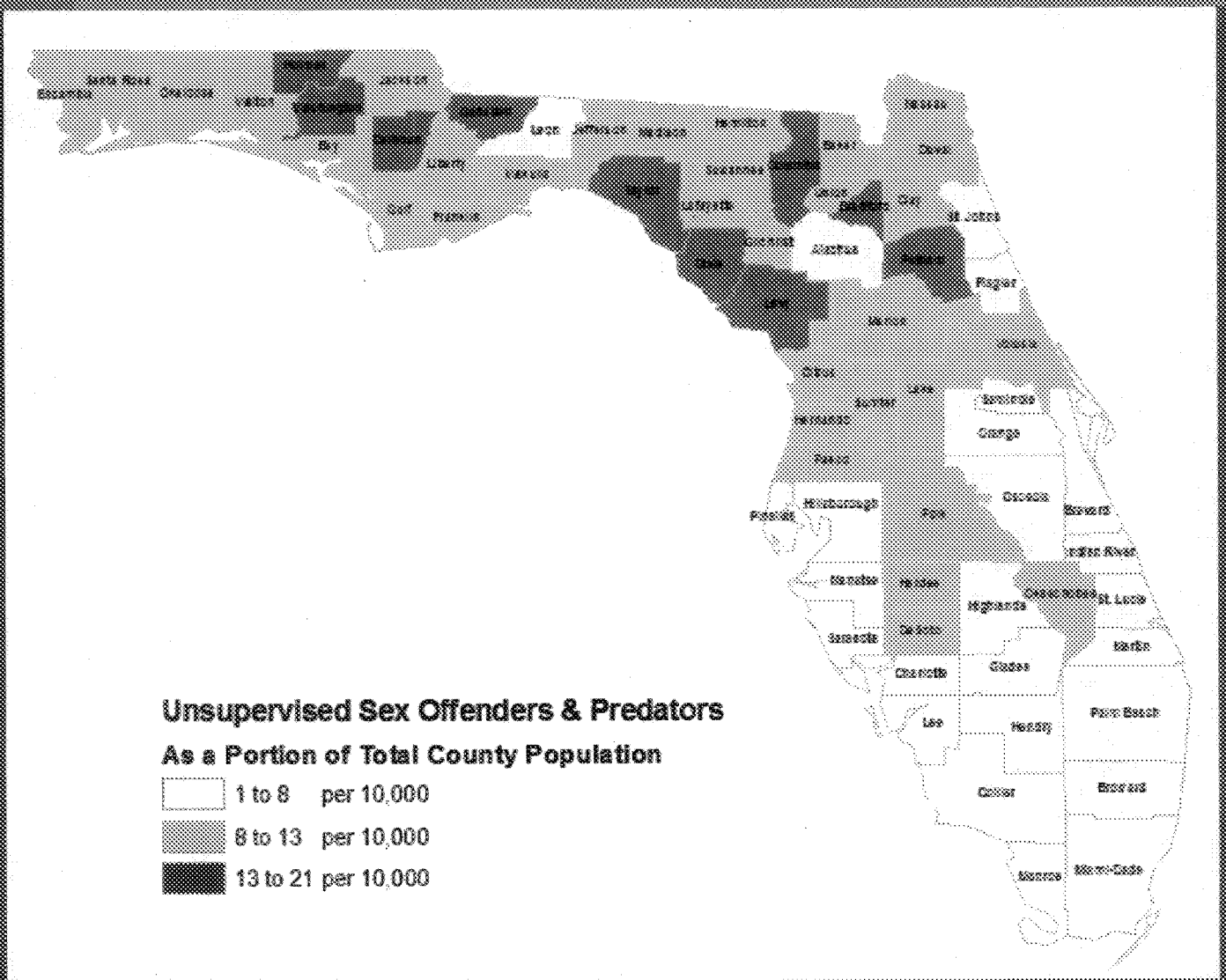
GROUP A1

Total supervised and unsupervised sex offenders and predators per 10,000 residents



GROUP A2

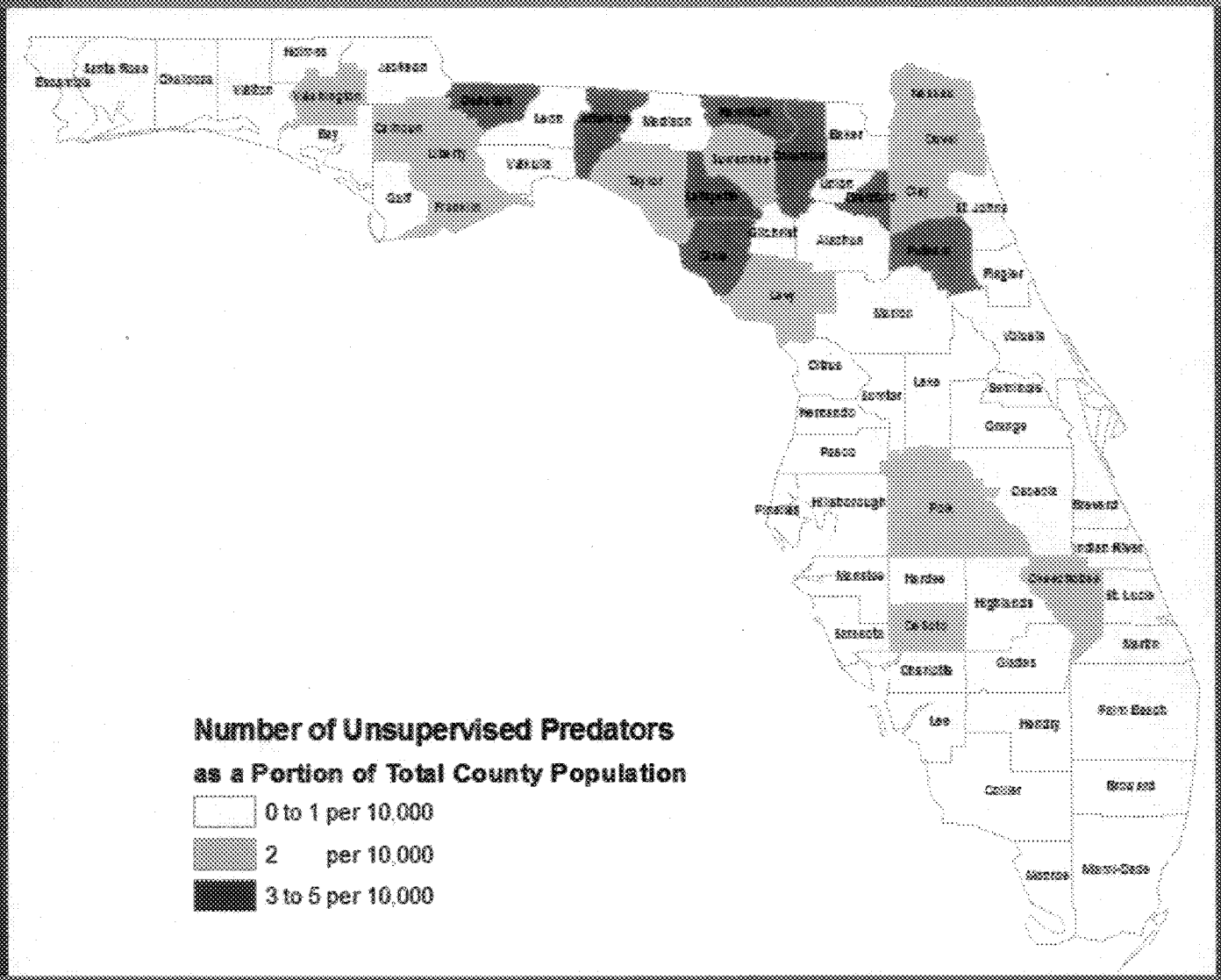
Unsupervised sex offenders and predators per 10,000 residents



GROUP

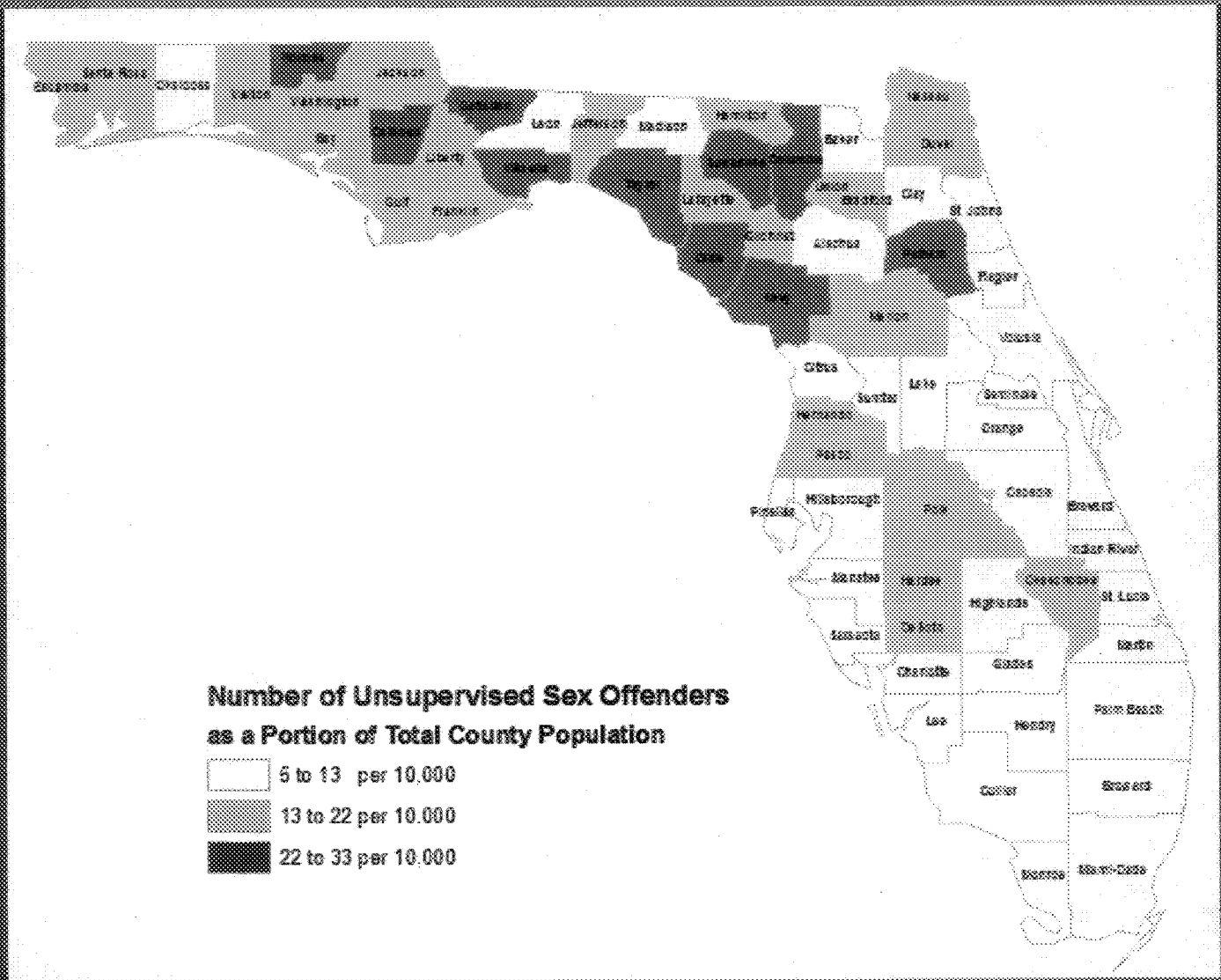
A3

Unsupervised sex predators per 10,000 residents



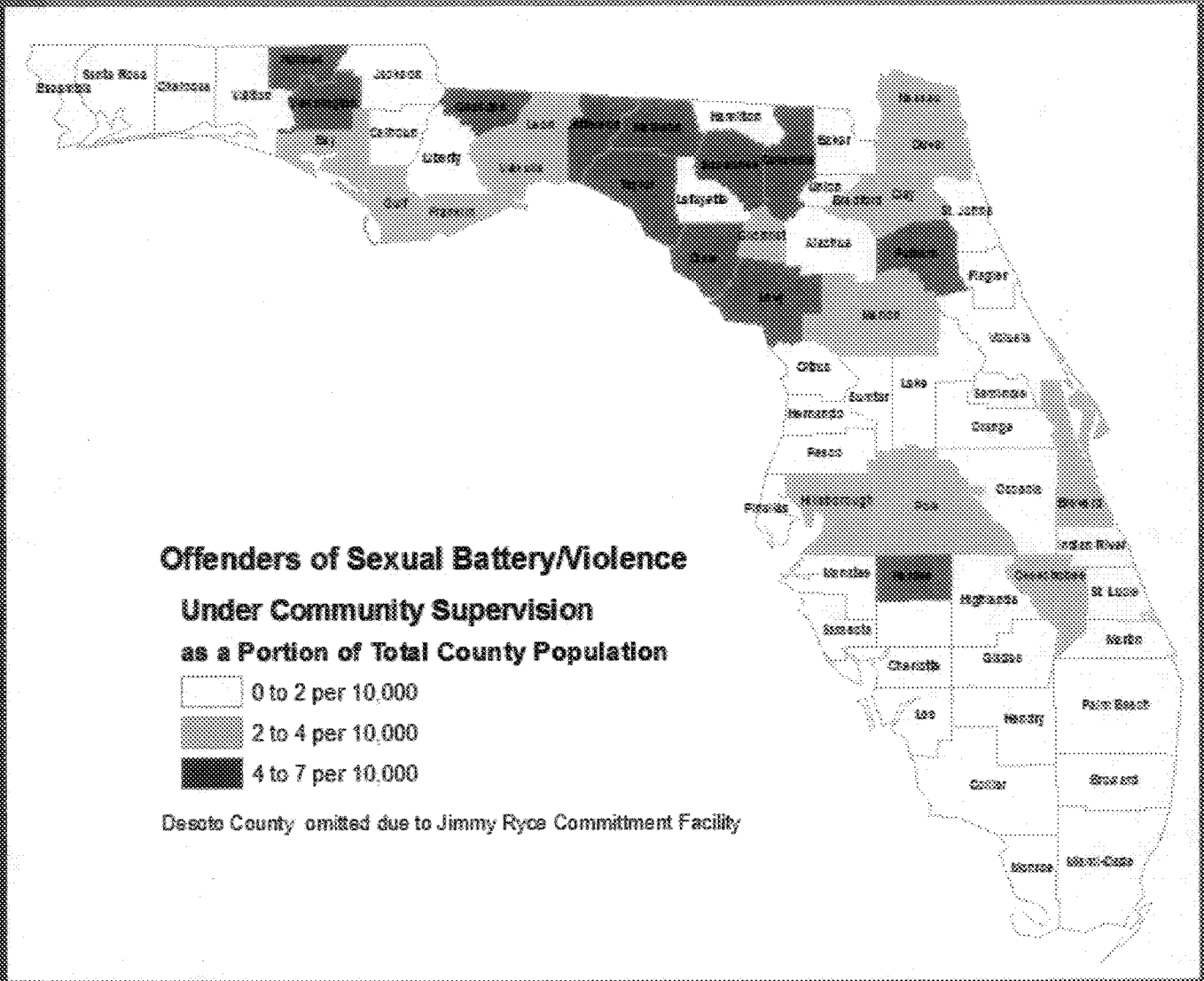
GROUP A4

Unsupervised sex offender population per 10,000 residents



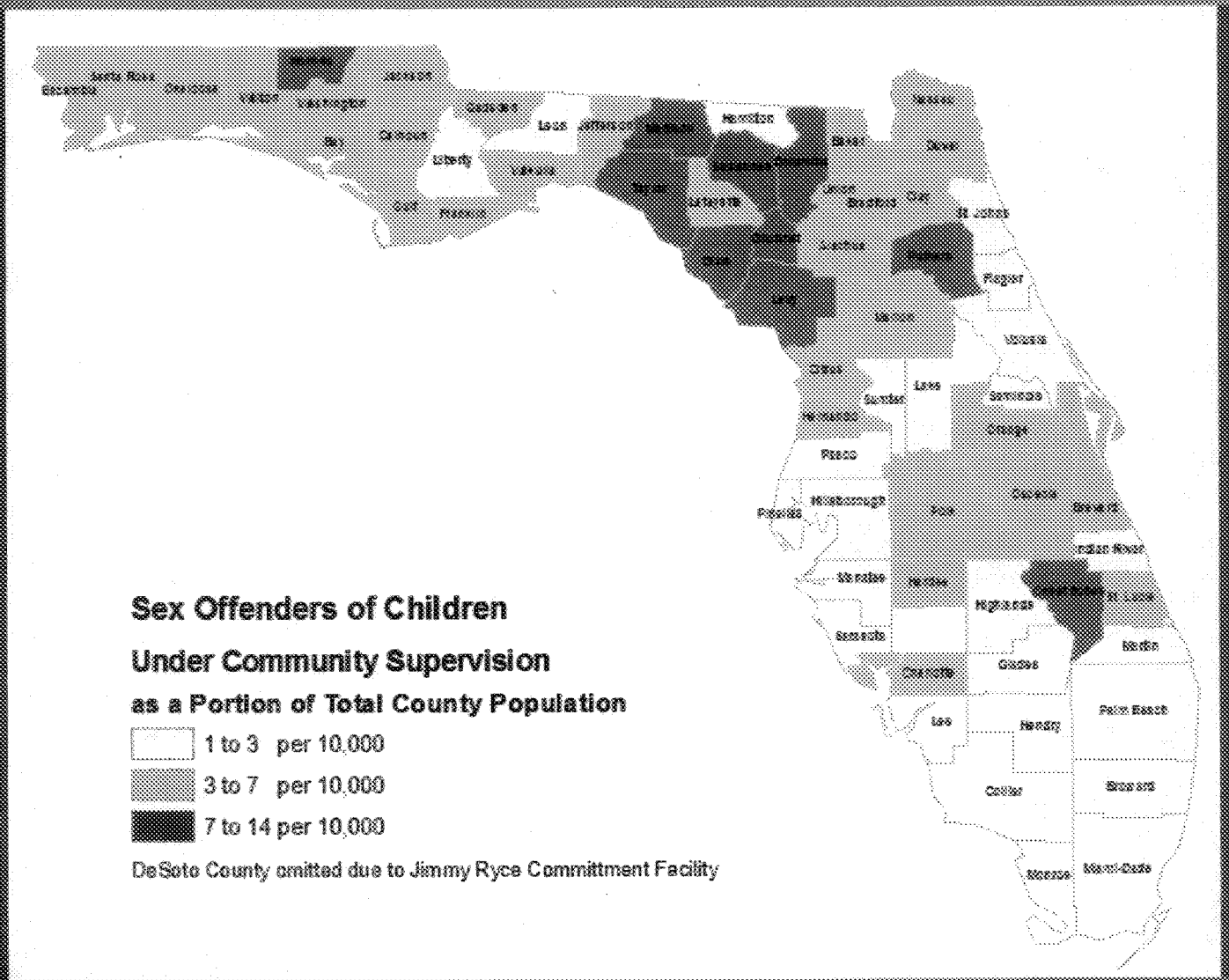
GROUP A5

Supervised offenders convicted of sexual battery/violence, per 10,000 residents



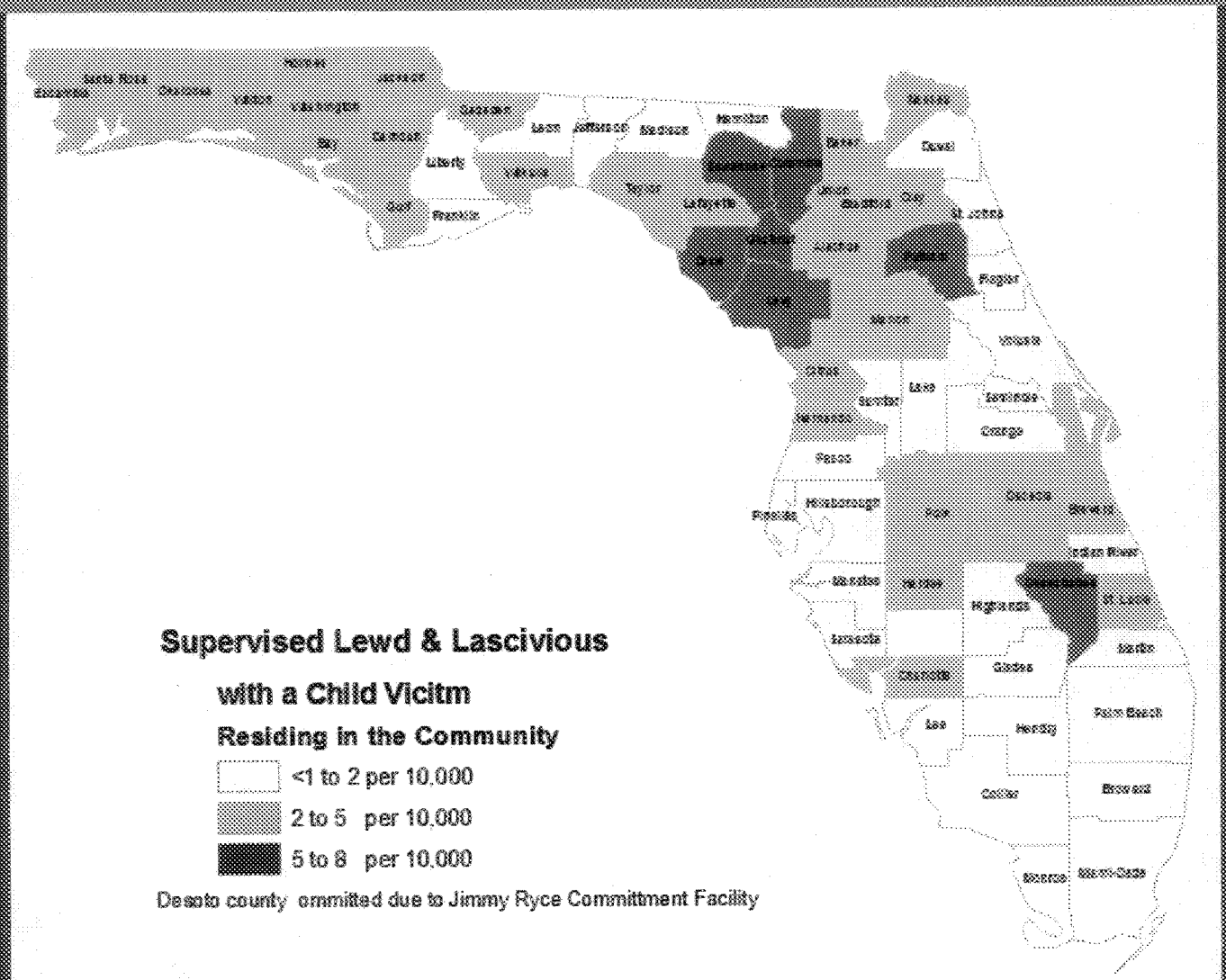
GROUP B1

Supervised sex offenders with child victims, per 10,000 residents



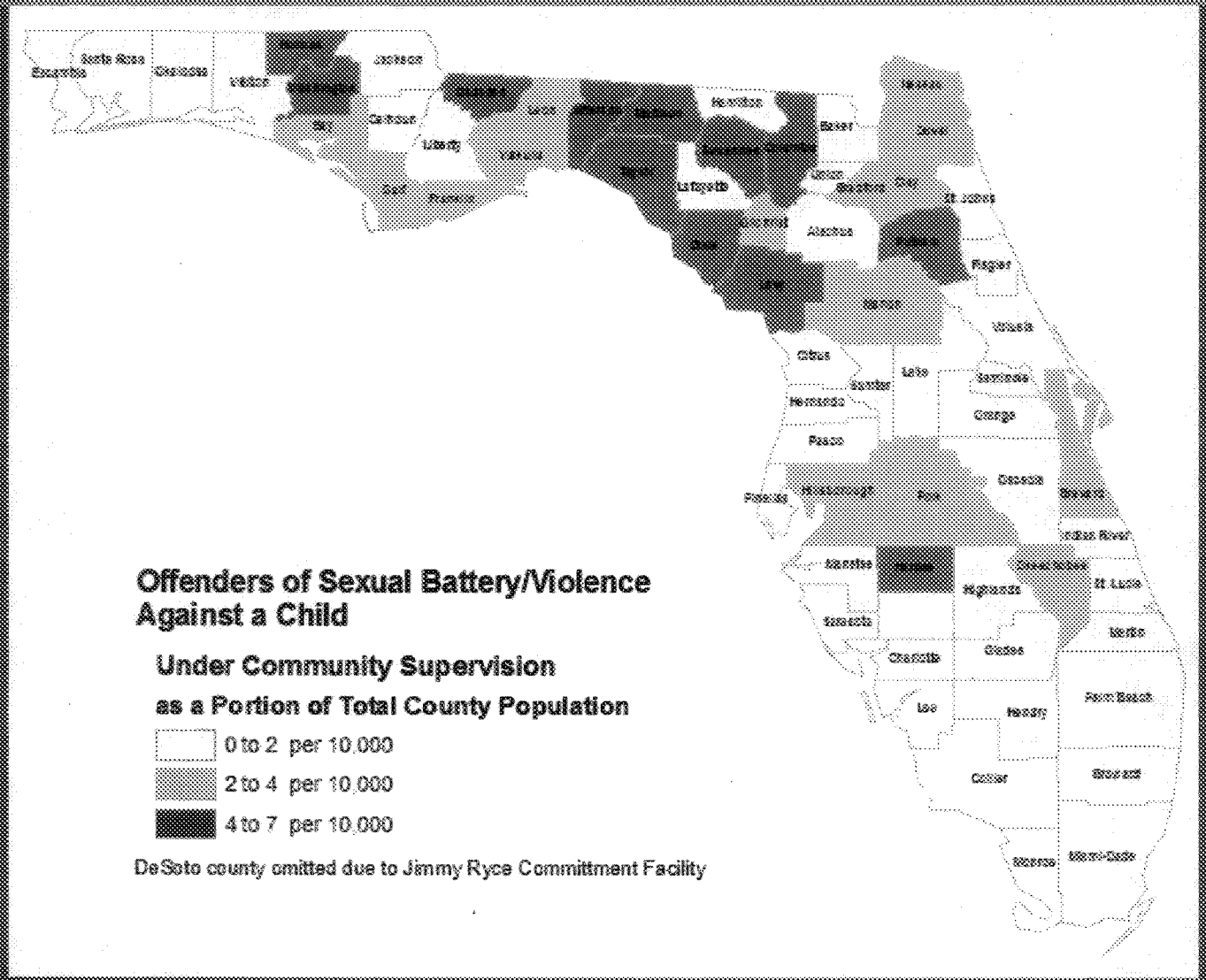
GROUP B2

Supervised offenders of Lewd and Lascivious with child victims, per 10,000 residents



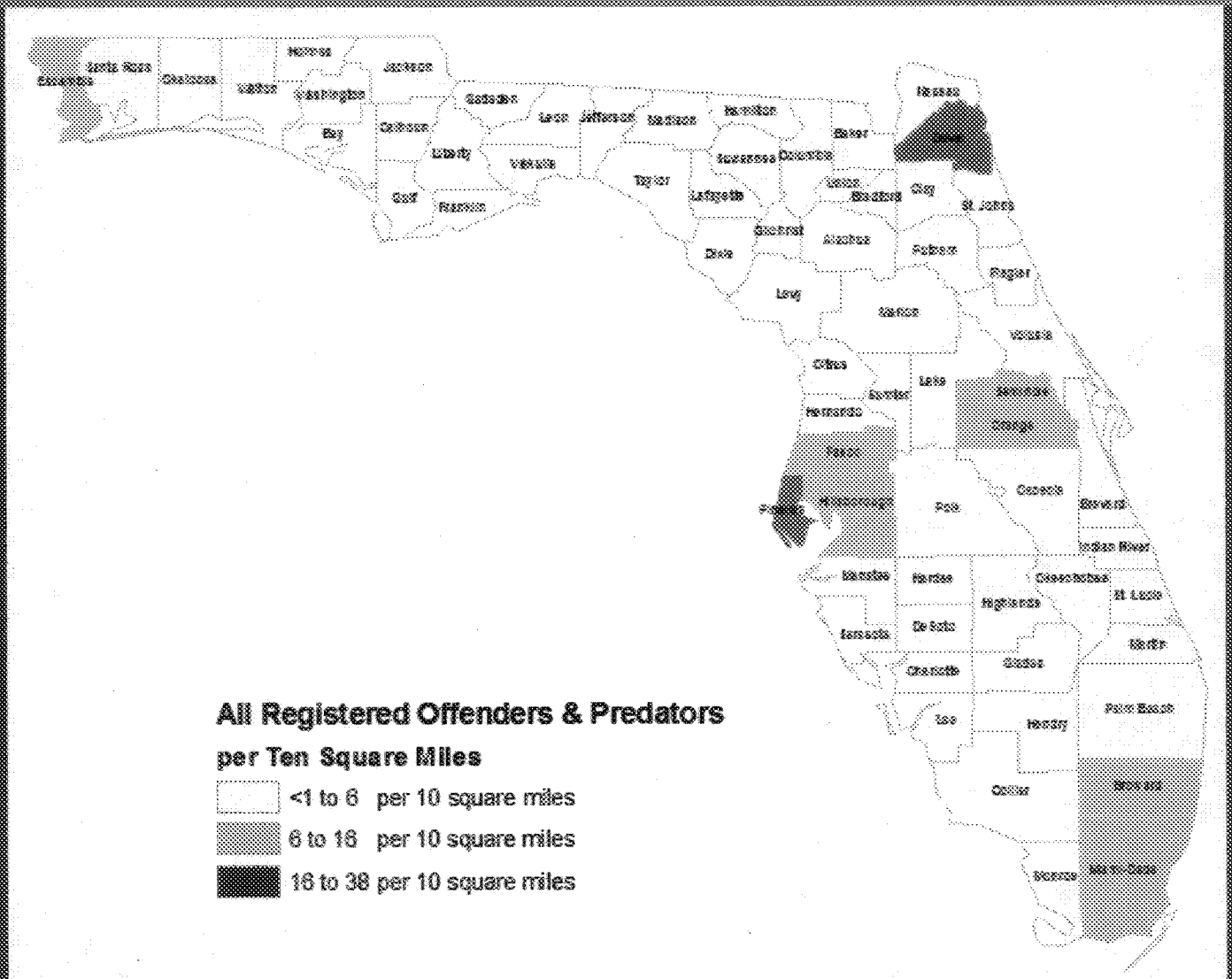
GROUP B3

Supervised offenders of sexual battery/violence with child victims, per 10,000 residents



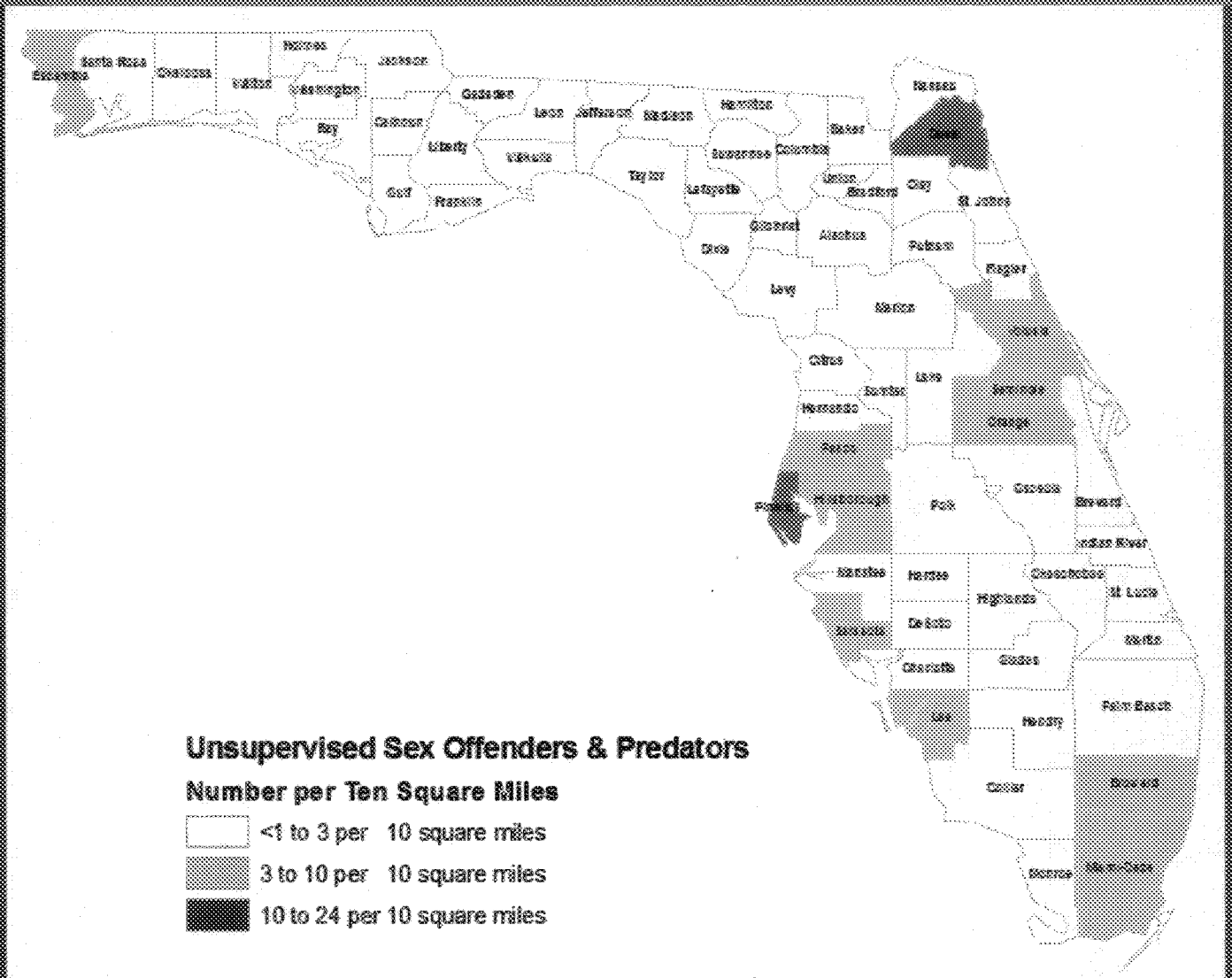
GROUP A1

Total supervised and unsupervised sex offenders and predators per ten square miles



GROUP A2

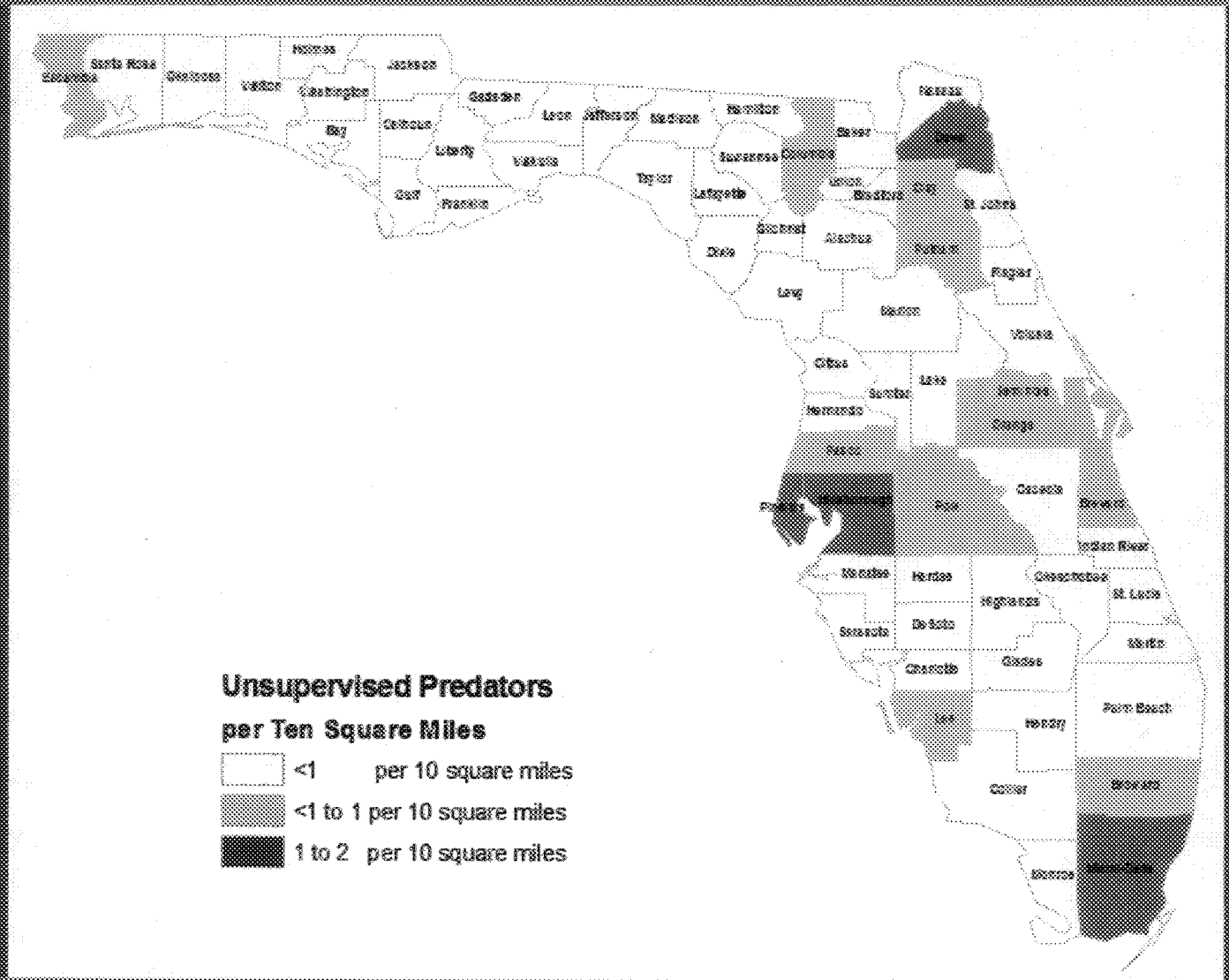
Unsupervised sex offenders and predators number per ten square miles



GROUP

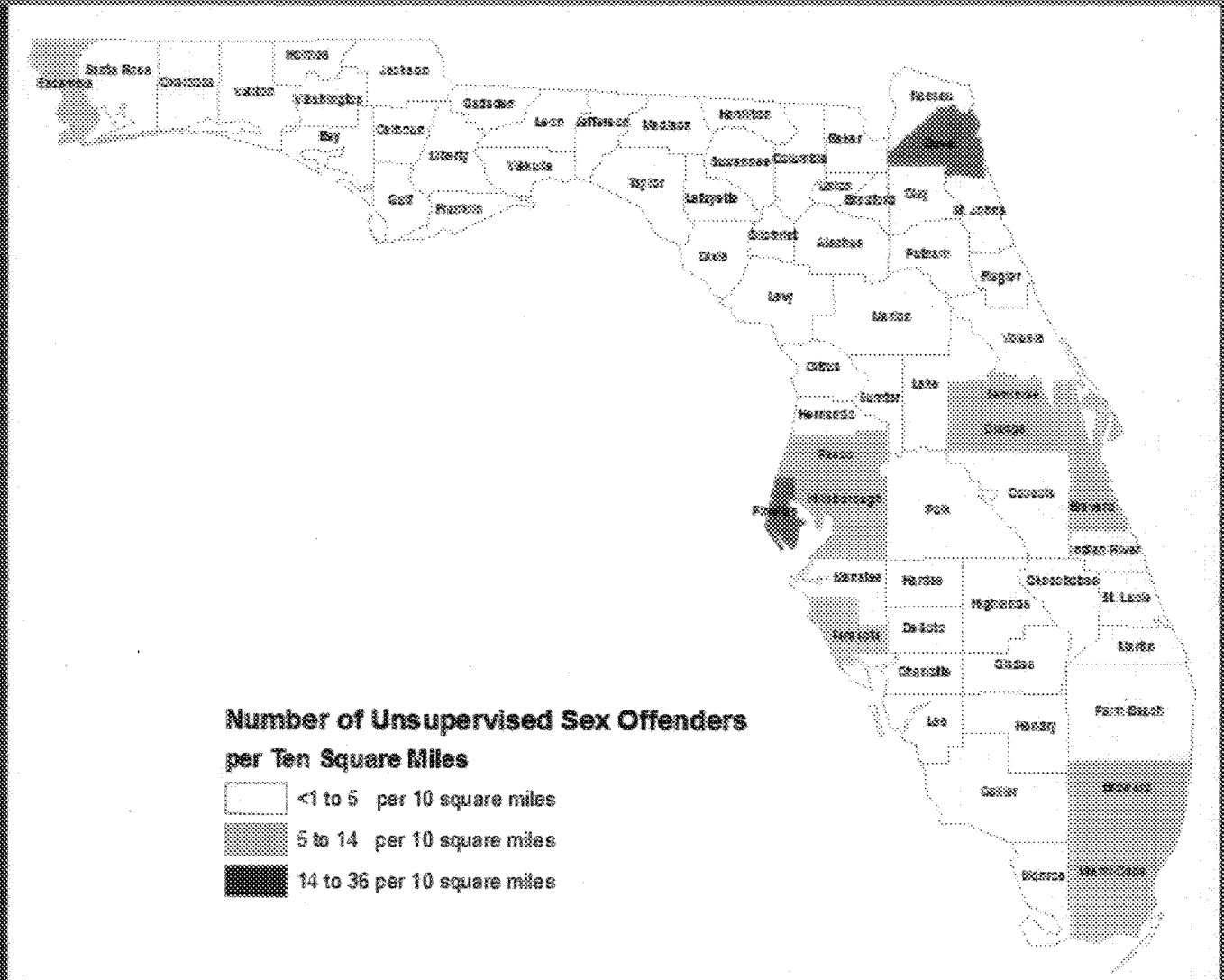
A3

Unsupervised sex predators number per ten square miles



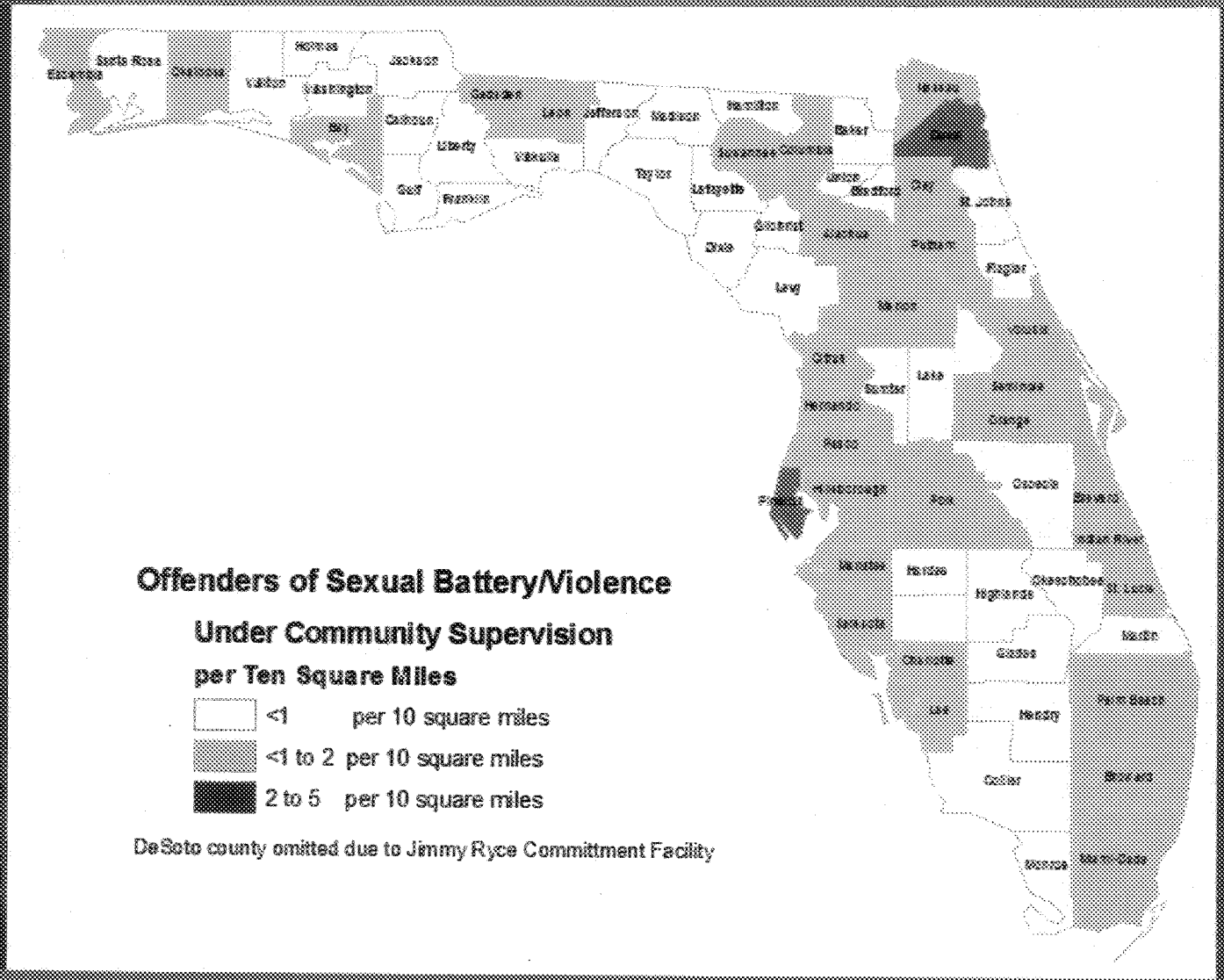
GROUP A4

Unsupervised sex offenders number per ten square miles



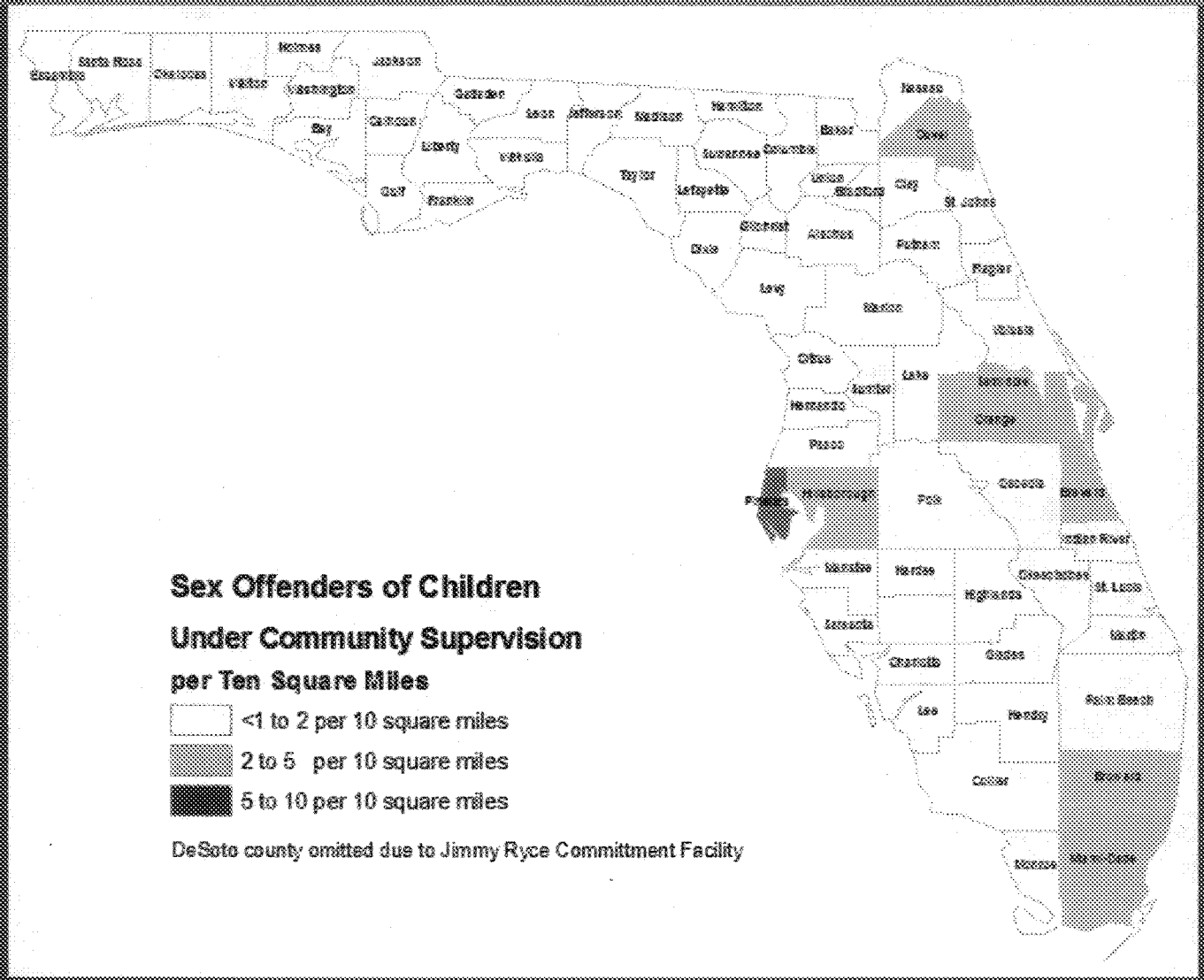
GROUP A5

Supervised offenders convicted of sexual battery/violence per ten square miles



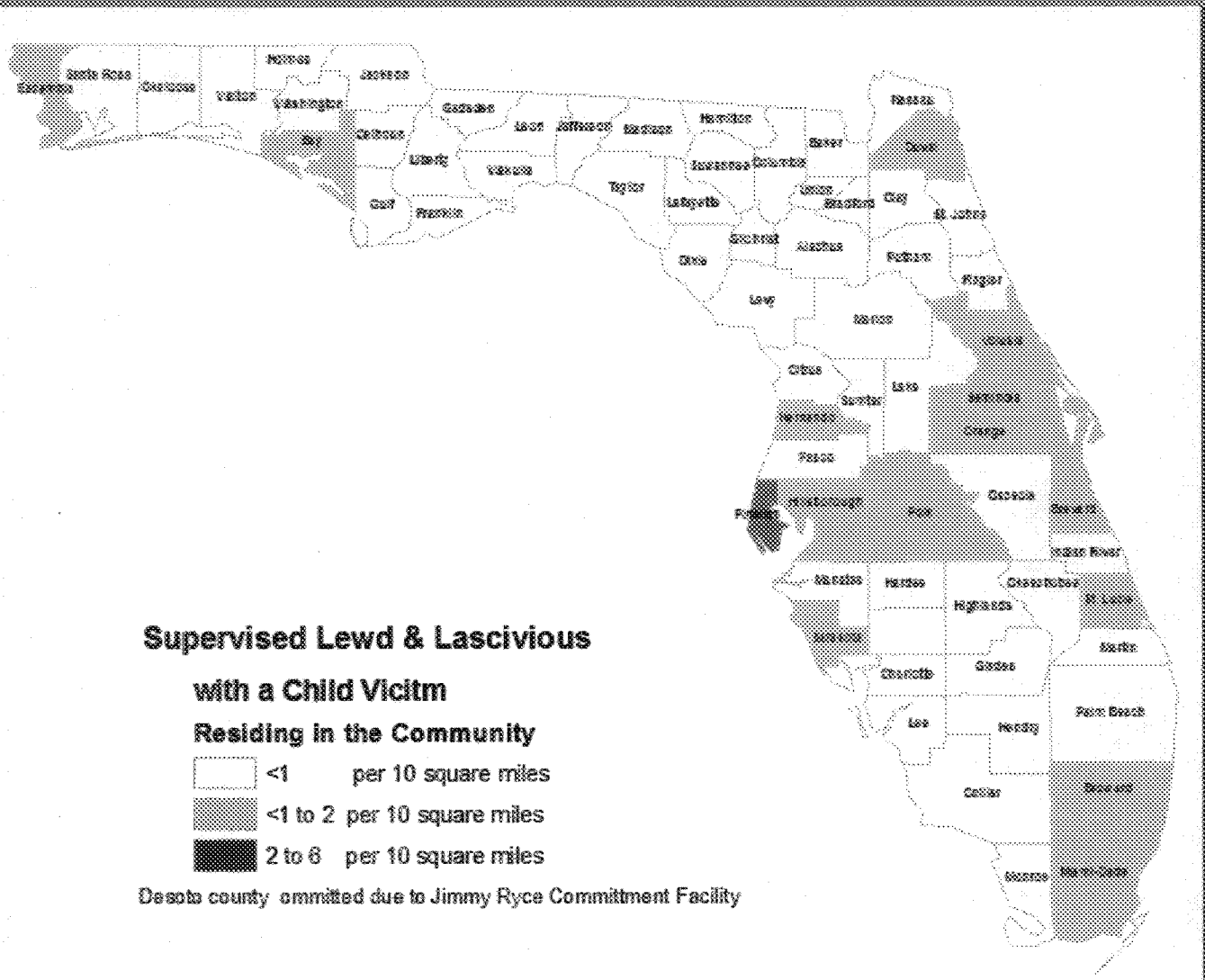
GROUP B1

Supervised sex offenders with child victims, per ten square miles

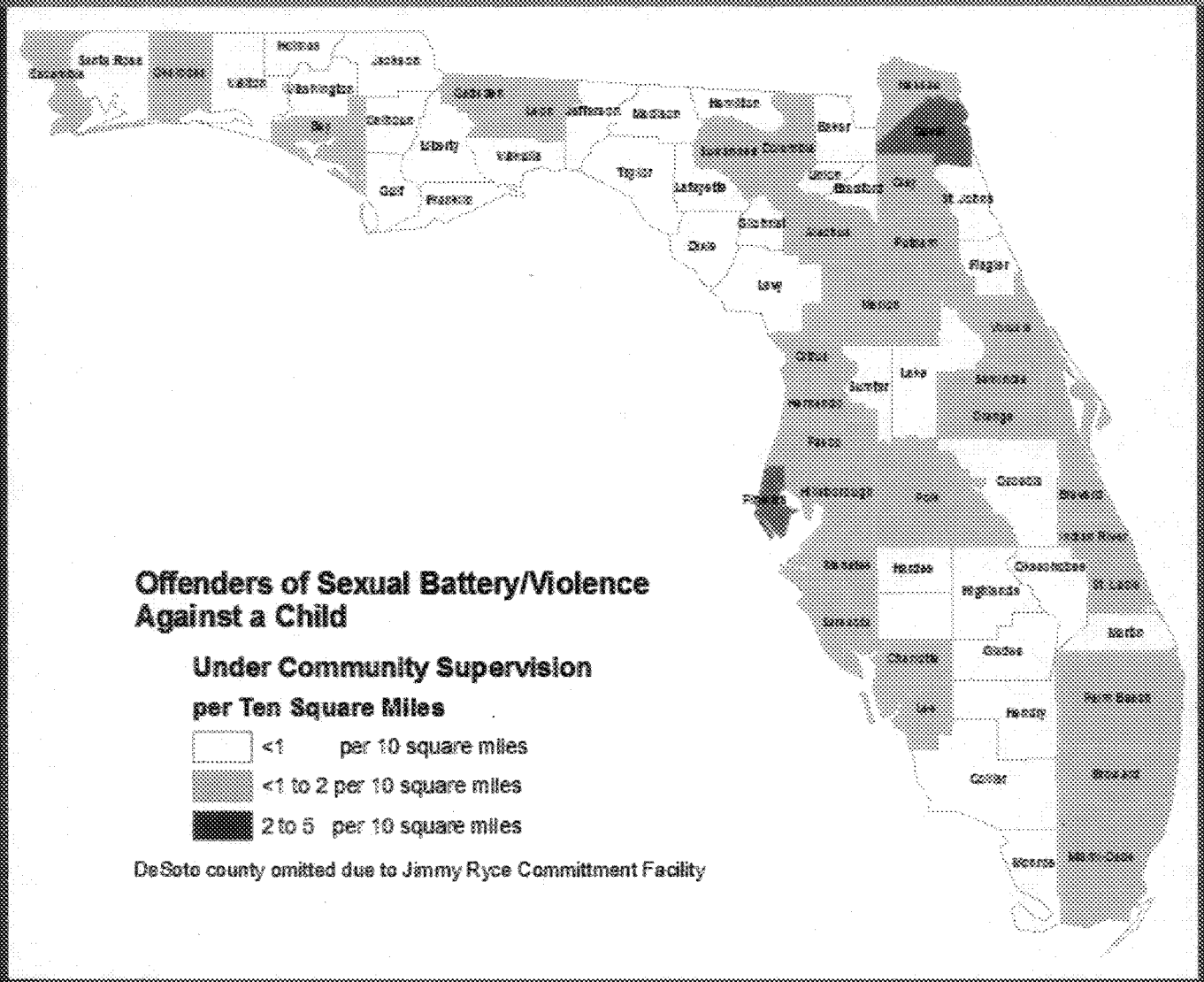


GROUP B2

Supervised offenders of Lewd and Lascivious with child victims, per ten square miles

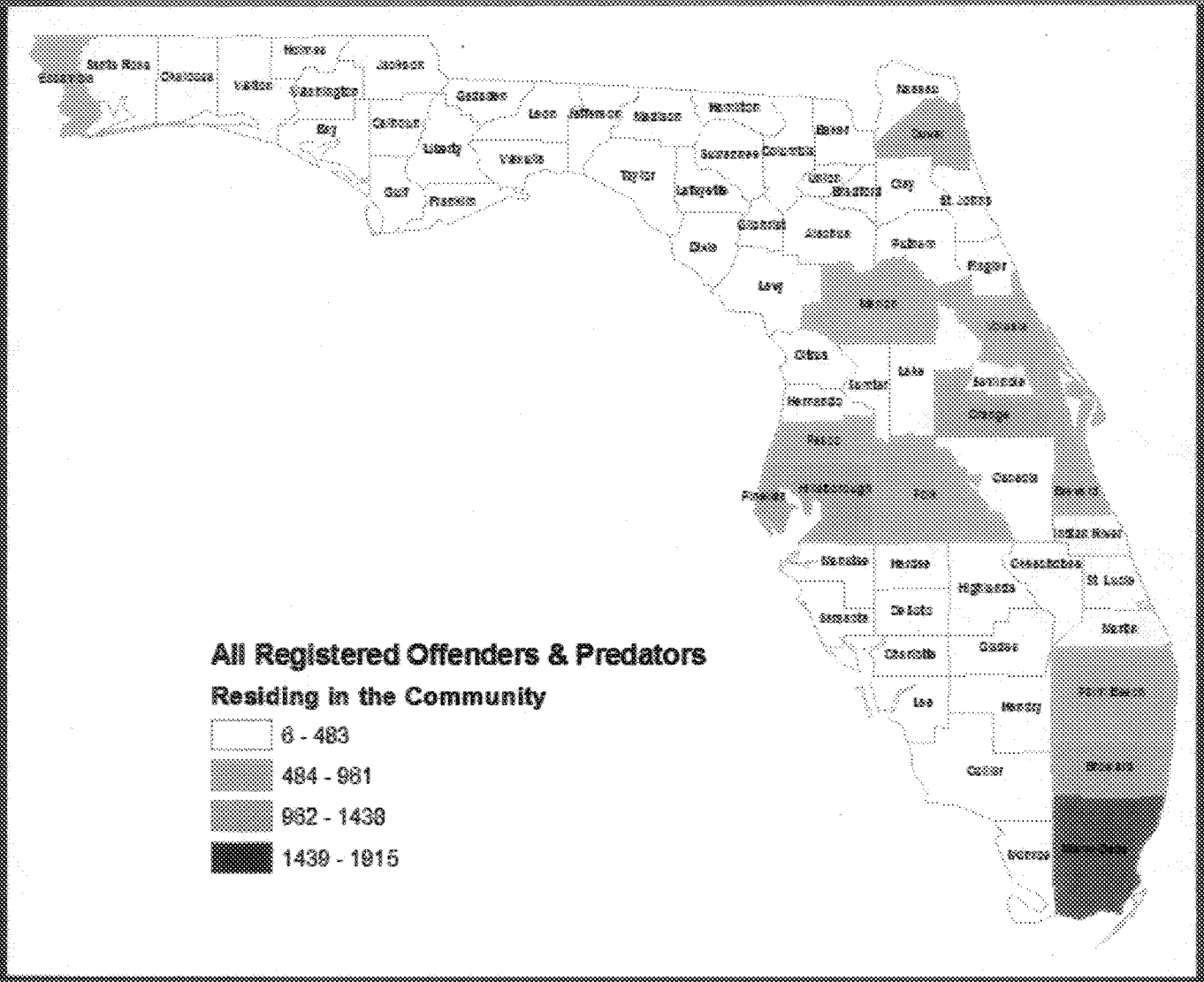


GROUP B3 Supervised offenders of sexual battery/violence with child victims, per ten square miles

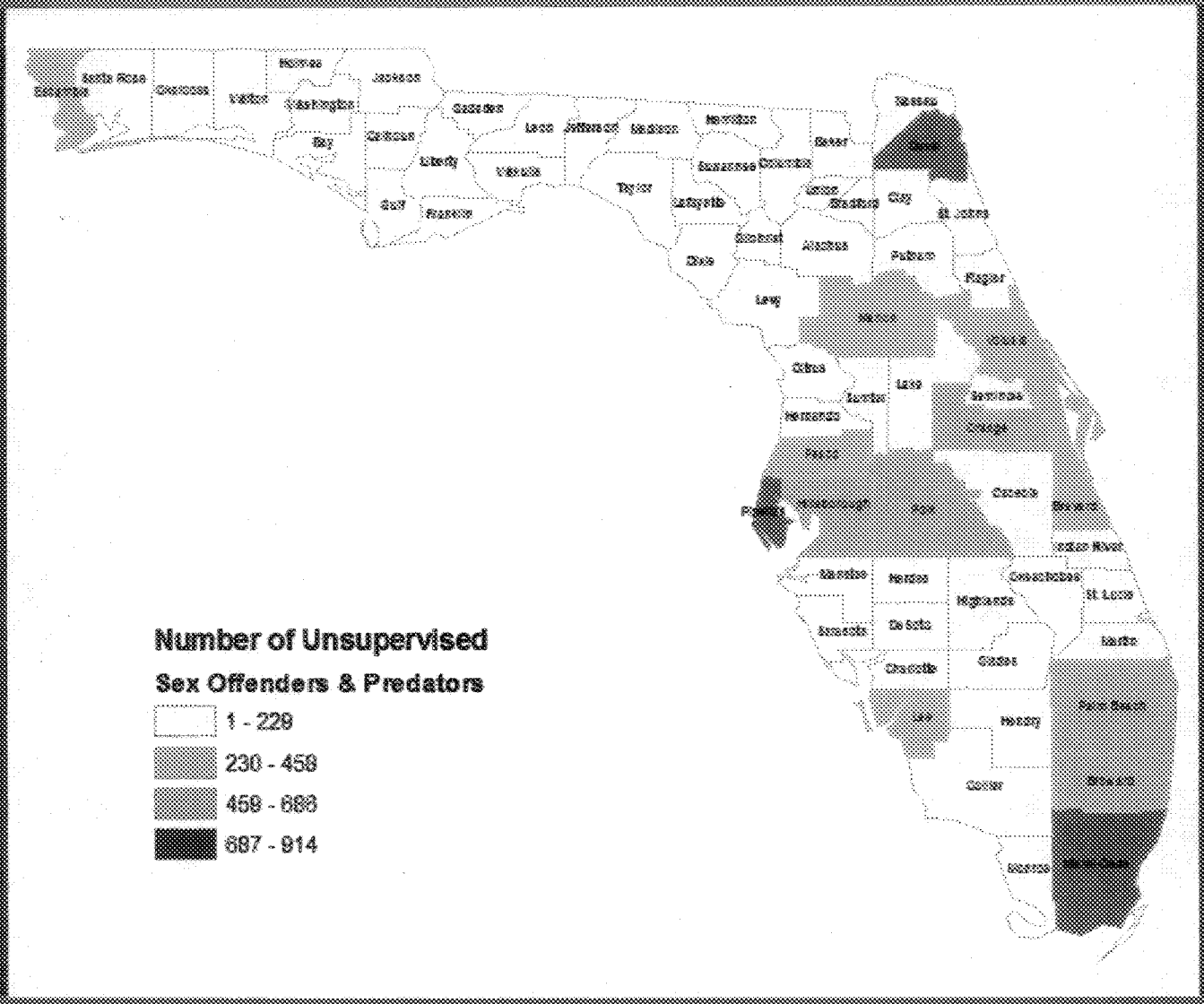


GROUP A1

Total sex offenders and predators in the community

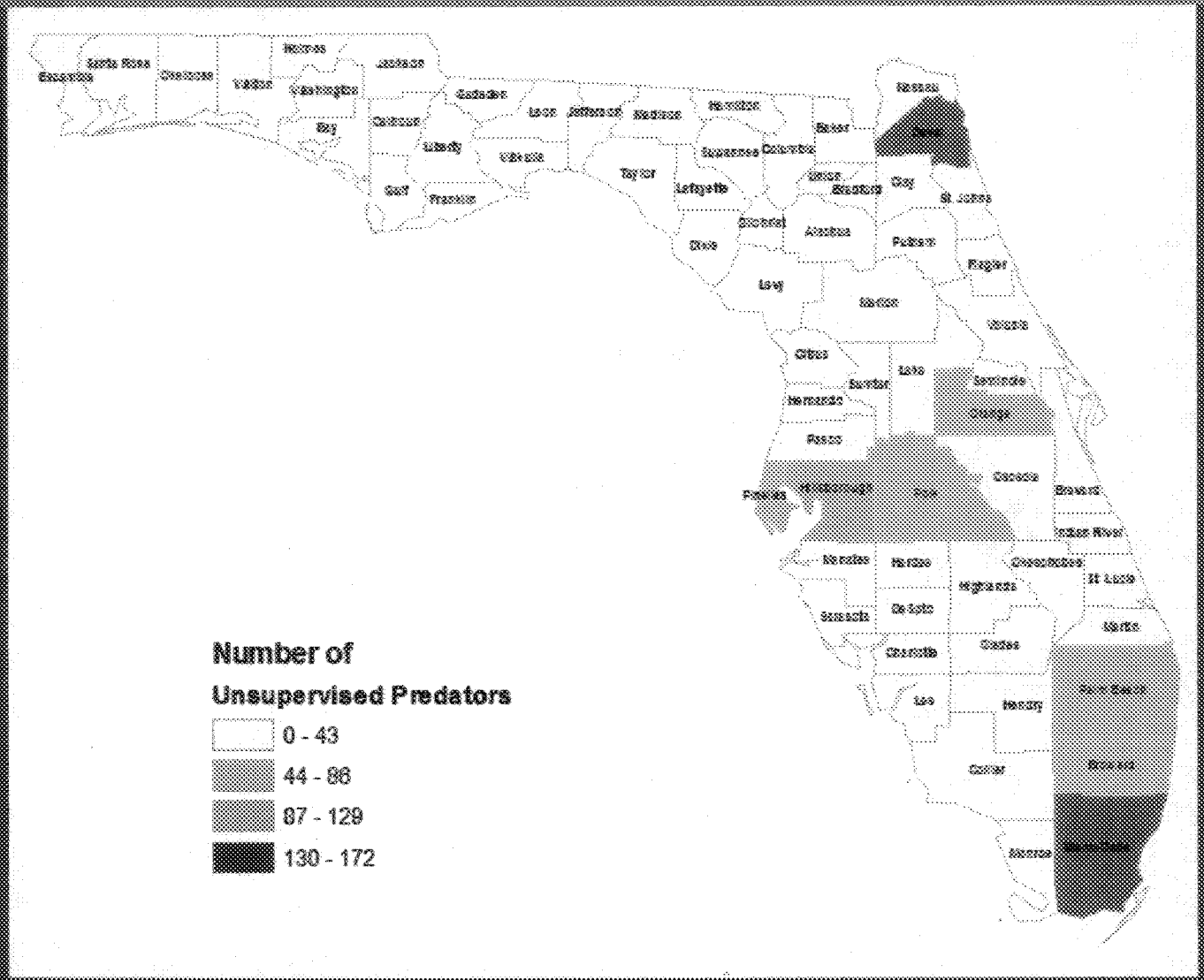


GROUP A2 Number of unsupervised sex offenders and predators



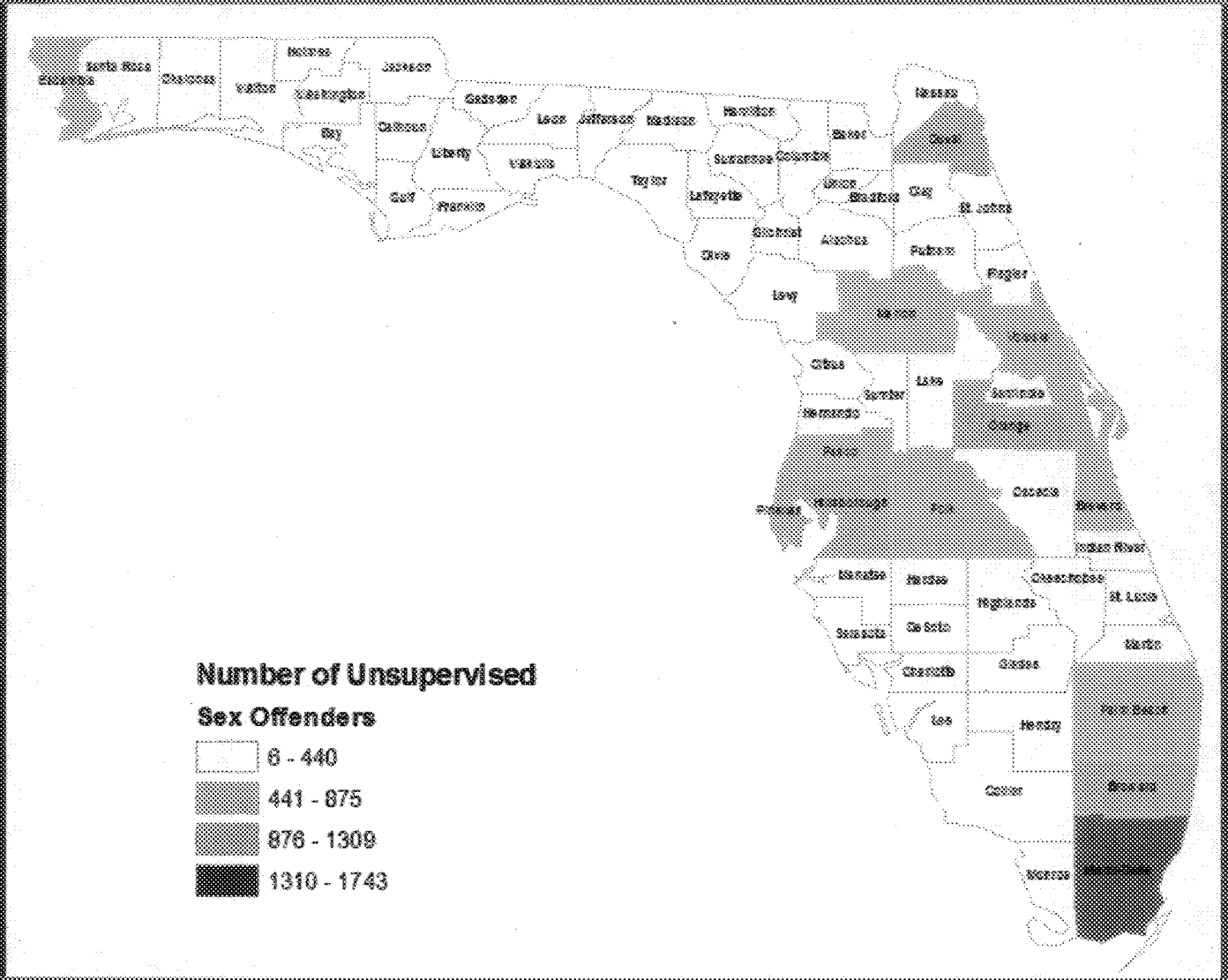
GROUP A3

Number of unsupervised sex predators



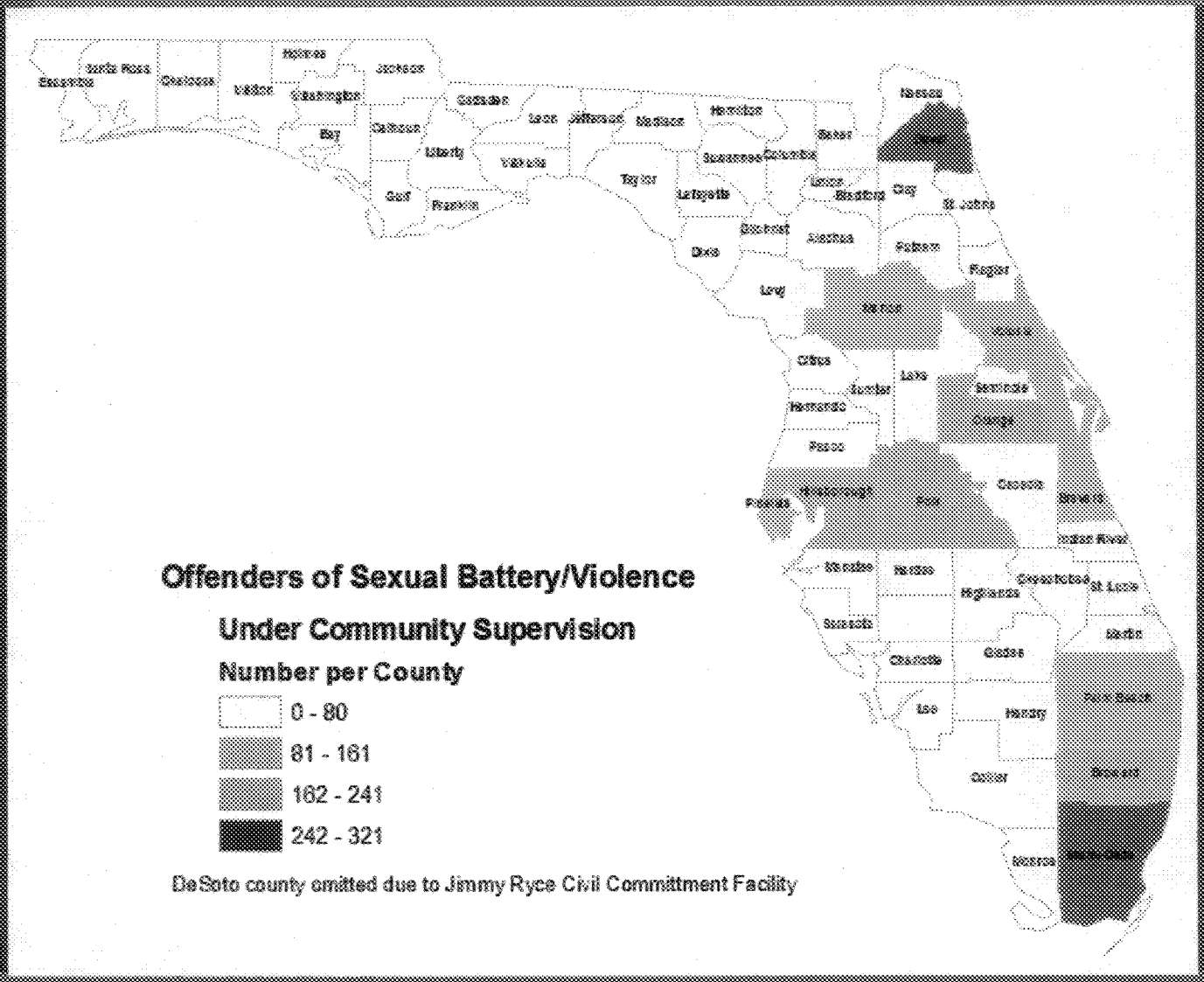
GROUP A4

Number of unsupervised sex offenders



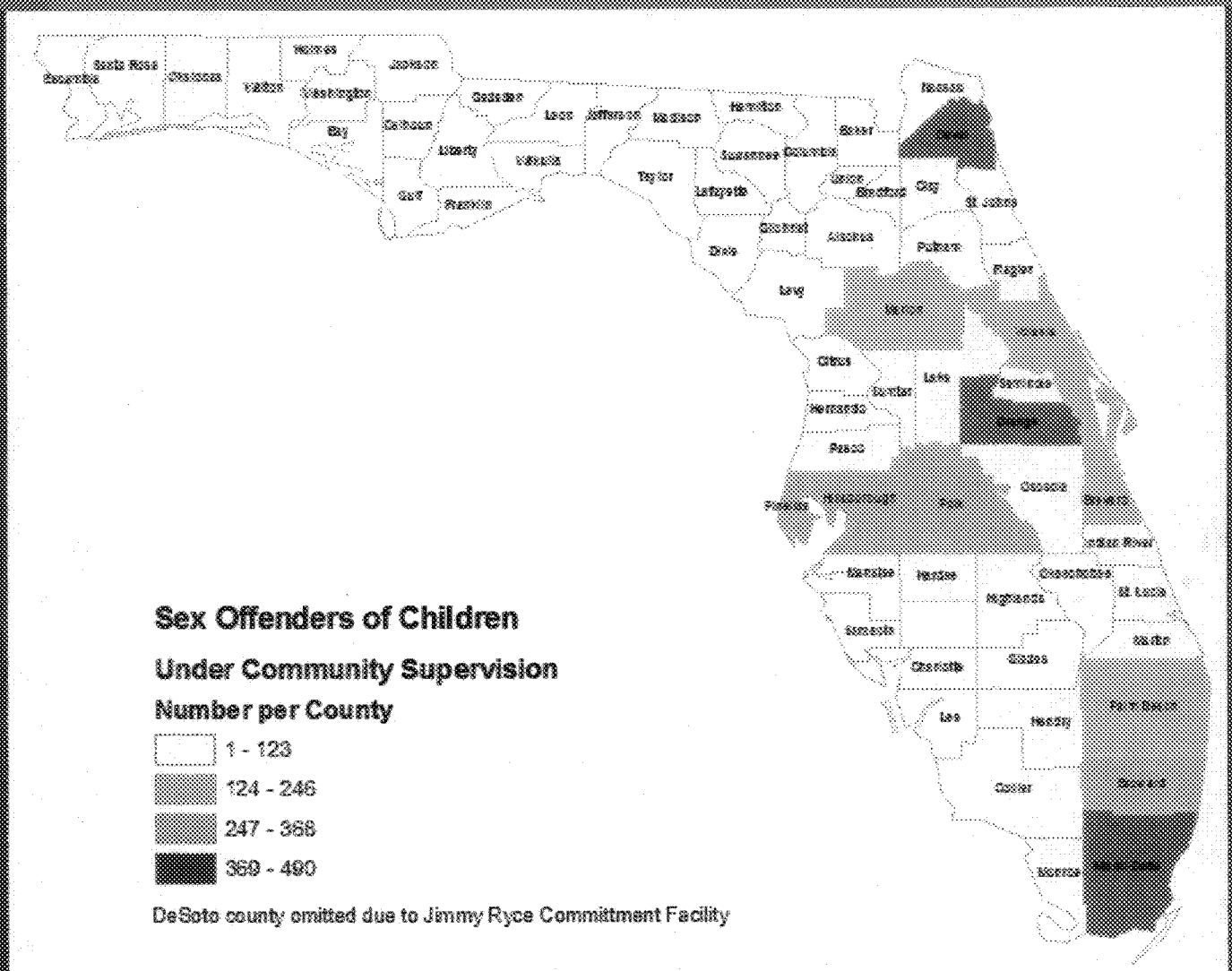
GROUP A5

Number of supervised offenders convicted of sexual battery/violence



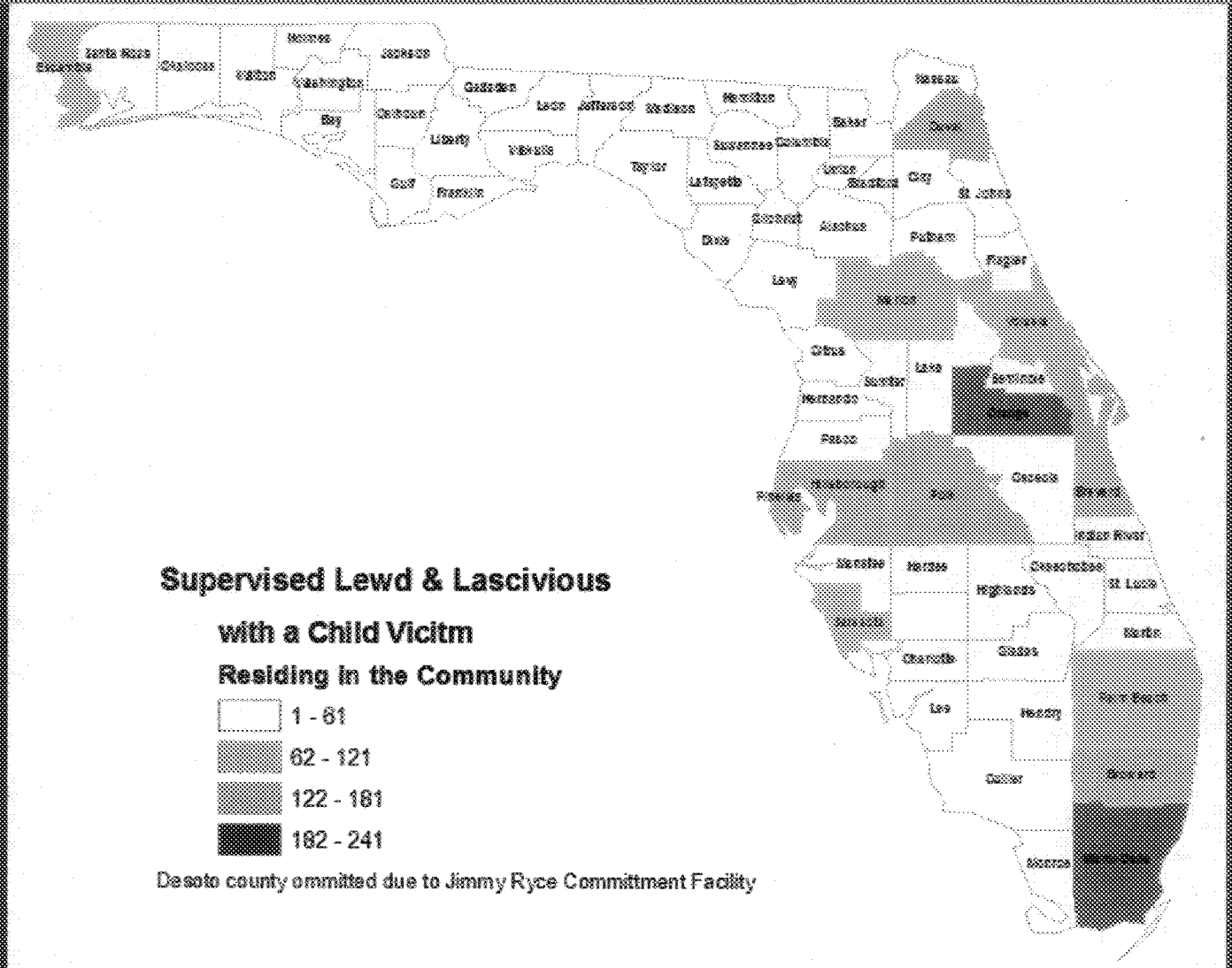
GROUP B1

Number of supervised sex offenders with child victims



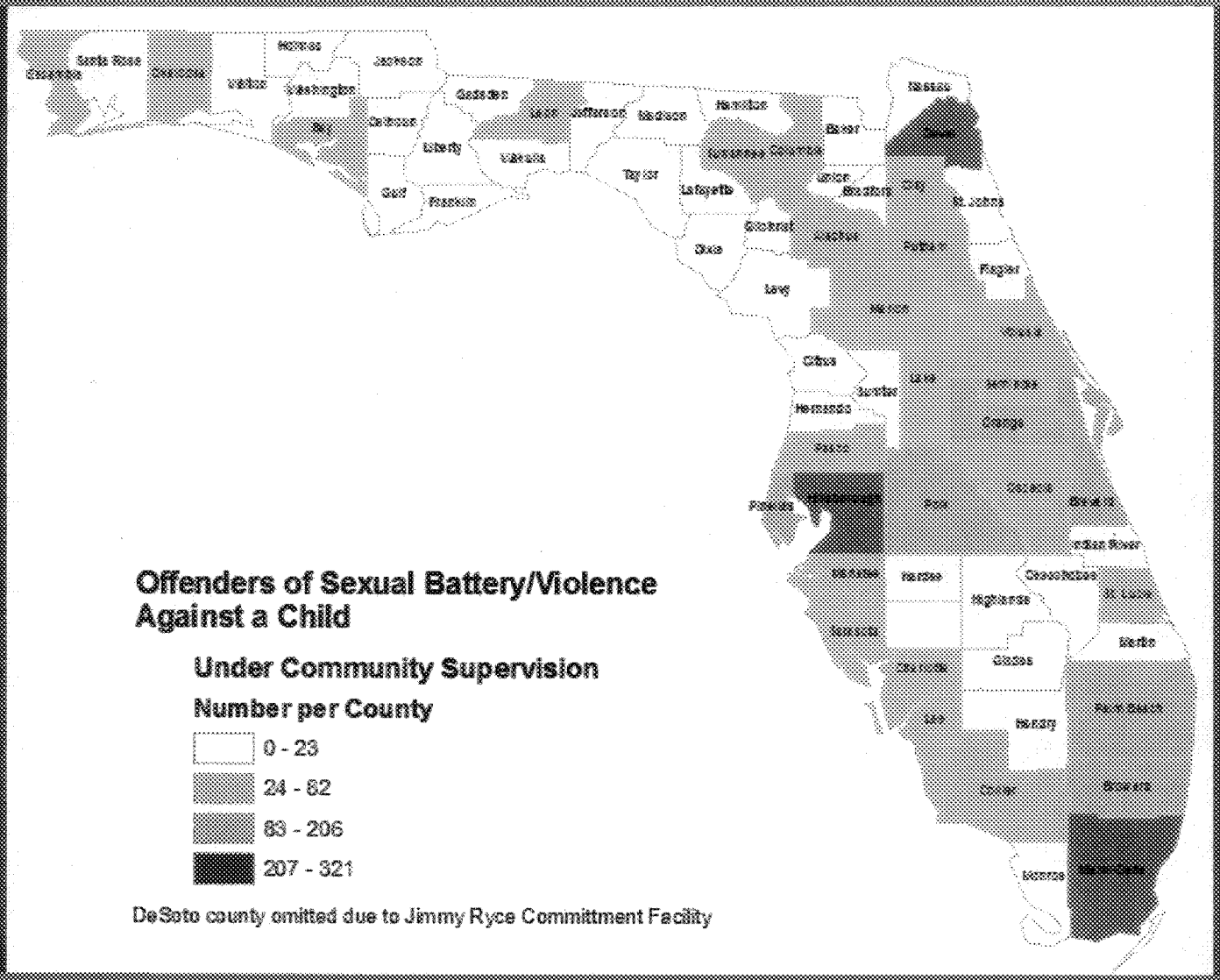
GROUP B2

Number of supervised Lewd and Lascivious offenders with child victims



GROUP B3

Number of supervised offenders of sexual battery/violence with child victims



Sex Offenders in the Community

- Using the data that we have previously referenced we have developed the following charts to show breakdowns by offense type, use of EM, and sex crimes with children as victims.

Electronic Monitoring of Supervised Offenders by Offense Category

Primary conviction offense	Electronic Monitoring		No EM		TOTAL	
Sexual battery, sexual violence	142	5%	2,977	95%	3,119	100%
Lewd and Lascivious, no battery	140	5%	2,947	95%	3,087	100%
Other sex offenses (e.g., prostitution, porn)	15	2%	777	98%	792	100%
Subtotal	297	4%	6,701	96%	6,998	100%
Violent Offenses	164	<1%	27,187	>99%	27,351	100%
Property / Fraud	131	<1%	45,600	>99%	45,731	100%
Drug Offenses	95	<1%	32,604	>99%	32,699	100%
Other Offenses	12	<1%	3,958	>99%	3,970	100%
Subtotal	402	<1%	109,349	>99%	109,751	100%
TOTAL	699	<1%	116,050	>99%	116,749	100%

Supervised Offenders by Type of Monitoring Device

Primary conviction offense	Active GPS		Passive GPS		Radio Frequency		TOTAL	
Sexual battery, sexual violence	120	85%	6	4%	16	11%	142	100%
Lewd and Lascivious, no battery	115	82%	7	5%	18	13%	140	100%
Other sex offenses (e.g., prostitution, porn)	12	80%	1	7%	2	13%	15	100%
Violent Offenses	107	65%	1	1%	56	34%	164	100%
Property / Fraud	77	59%	5	4%	49	37%	131	100%
Drug Offenses	50	53%	3	3%	42	44%	95	100%
Other Offenses	8	67%	0	0%	4	33%	12	100%
TOTAL	489	70%	23	3%	187	27%	699	100%

Supervised Offenders by Type of Monitoring Device

Primary conviction offense	Active GPS		Passive GPS		Radio Frequency		TOTAL	
Sexual battery, sexual violence	120	17%	6	1%	16	2%	142	20%
Lewd and Lascivious, no battery	115	16%	7	1%	18	2%	140	20%
Other sex offenses (e.g., prostitution, porn)	12	2%	1	<1%	2	<1%	15	2%
Subtotal	247	35%	14	2%	36	5%	297	42%
Violent Offenses	107	15%	1	<1%	56	8%	164	23%
Property / Fraud	77	11%	5	1%	49	7%	131	19%
Drug Offenses	50	7%	3	<1%	42	6%	95	14%
Other Offenses	8	1%	0	0%	4	1%	12	2%
Subtotal	242	35%	9	1%	151	22%	402	58%
GRAND TOTAL	489	70%	23	3%	187	27%	699	100%

Sex offenders by age of victim and electronic monitoring

All Sex Offenses	EM		No EM		TOTAL	
Offenses against children	254	4%	5,284	75%	5,538	79%
Offenses against adults	28	<1%	640	9%	668	10%
Other sex offenses (e.g., prostitution, porn)	15	<1%	777	11%	792	11%
TOTAL	297	4%	6,701	96%	6,998	100%

Sex offenders by offense category and age of victim

All Sex Offenses		TOTAL	
Sexual battery, sexual violence	Offense against child	2,502	80%
	Offense against adult	631	20%
	Subtotal	3,133	100%
Lewd and Lascivious	Offense against child	3,045	99%
	Offense against adult	28	1%
	Subtotal	3,073	100%
Other sex offenses (e.g., prostitution, porn)		792	100%
TOTAL		6,998	100%

Sex offenders by age of victim and offense category

All Sex Offenses		TOTAL	
Offenses against children	Sexual battery, sexual violence	2,502	45%
	Lewd and Lascivious	3,045	55%
	Subtotal	5,547	100%
Offenses against adults	Sexual battery, sexual violence	631	96%
	Lewd and Lascivious	28	4%
	Subtotal	659	100%
Other sex offenses (e.g., prostitution, porn)		792	100%
TOTAL		6,998	100%

oppaga
OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY

April 2005 Report No. 05-19

Electronic Monitoring Should Be Better Targeted to the Most Dangerous Offenders

at a glance

Electronic monitoring is a technological tool to enhance surveillance of offenders in the community. On December 24, 2004, the Department of Corrections was electronically monitoring 705 offenders.

While electronic monitoring can help improve offender supervision, it is not currently used for the highest risk offenders. Currently, 70% of the offenders on electronic monitoring are on community control supervision, a prison diversion program serving offenders with mostly property or drug offenses. Only 30% of the electronic monitoring units are used to supervise more dangerous habitual and sex offenders. Shifting the monitoring units to more dangerous offenders could be done by making electronic monitoring a standard condition of supervision, requiring the Department of Corrections to use its risk assessment instrument to prioritize offenders for this supervision, and giving the department the discretion to require use of this technology.

Electronic monitoring provides greater surveillance of offenders under supervision, but its effect on deterring future crime is unknown. The department should study the effectiveness of alternate types of electronic monitoring using a valid research design and report the results to the Legislature.

Scope

This project was conducted in response to a legislative request to provide information about the use of electronic offender monitoring technology.

Background

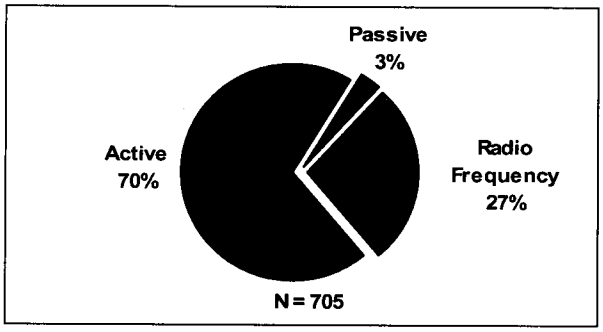
Electronic monitoring is a technological tool to enhance surveillance of offenders in the community. The Legislature approved the use of electronic monitoring in 1987. The Department of Corrections contracts for this service with private vendors that provide tracking units worn by offenders and operate monitoring centers. In Fiscal Year 2003-04, the department paid $2,413,615 to vendors to electronically supervise 1,706 offenders during that year.[1] On December 24, 2004, the department had 705 offenders under electronic monitoring, representing 0.6% of the 116,277 offenders then supervised in the community.[2]

The department currently uses three types of electronic monitoring equipment—Radio Frequency, Active GPS, and Passive GPS. As shown in Exhibit 1, most of the 705 electronically monitored offenders as of December 24, 2004, were supervised using Active GPS.

[1] The department contracts with BI, Inc., for radio frequency, and Pro-Tech Monitoring, Inc., for GPS electronic monitoring services.

[2] Active supervised population (does not include absconders, out-of-state offenders, or those on active suspense)

Exhibit 1
Most Offenders Are Monitored With Active GPS



Source: OPPAGA analysis of Department of Corrections data.

Radio Frequency. This first generation technology relies on radio frequency transmissions and has been used in Florida since 1988. Radio frequency monitoring essentially imposes a curfew on offenders and monitors whether they are at their residences at required times. The offender wears a transmitter, usually around the ankle, and a receiver unit is connected to the offender's landline telephone. The unit connects electronically to the ankle band and transmits a signal to a monitoring center. The monitoring center is notified if the offender strays too far from the receiver unit.

Active Global Positioning Satellite (GPS). This more advanced technology has been used since 1997, and uses global positioning satellites to track an offender's location in the community.

Offenders under GPS monitoring wear an ankle or wrist bracelet and carry a transmitter. The transmitter's signal is relayed by cell phone (included in the box carried by the offender) to the vendor monitoring center. This tracking information is available to probation officers via a link to the monitoring center, allowing offender to be tracked "real time" on a computer that is configured to reflect the offenders' location on a city map. This technology also allows probation officers to enter parameters that restrict an offender from being in certain geographic areas, or "exclusion zones," such as a victim's neighborhood or school. If the offender violates the boundaries of the exclusion zones, an alert is registered at the vendor monitoring center and relayed to the probation officer and, if a victim chooses to be notified, he/she is alerted by a beeper signal.

Passive Global Positioning Satellite (GPS). The Passive GPS system has many of the same features of the Active GPS system, but it does not report an offender's movements in "real time." Instead, the system maintains a log of the offender's location throughout the day and uses landline telephones to transmit a summary of this data to correctional officers the following day. With this system, once the offender is at home, he places the receiving unit into its base and the tracking points are downloaded and transmitted to the monitoring center. The system reviews where the offender has been that day, notes alerts, and the next day forwards a summary of the offender's locations to the probation officer for review and appropriate action.

Findings

Electronic monitoring is not being used on the most dangerous offenders

Electronic monitoring can provide a high degree of surveillance of offenders placed on community supervision. However, since there are only resources to monitor 0.6% of the population, they should be used judiciously to monitor those offenders who are considered most at-risk of committing a serious offense.

Currently, Florida law permits electronic monitoring to be used for two types of offenders—community control offenders and serious habitual and/or sex offenders. Community control was created in 1983 as a prison diversion program. It provides supervision for offenders charged with technical violations or misdemeanor offenses and felons who would not be placed on regular probation due to their criminal backgrounds or the seriousness of their offenses. These offenders are not considered by the court serious enough to place behind bars. By statute, offenders convicted more than once of a more serious violent or sex offense are ineligible for community control. Community control is imposed at sentencing, as a result of a plea agreement between the prosecutor and defense counsel or as a result of a judge's initiative. Florida law also authorizes the Department of Corrections to place community control offenders under electronic monitoring.

Florida law also permits the use of electronic monitoring for habitual violent offenders upon release from prison along with selected sex offenders. This population includes violent offenders with prior felony commitments, habitual offenders, and sexual predators who have served their sentences and have a term of probation to follow, pursuant to s. 948.12, *Florida Statutes*. In addition, sex offenders released from prison who are subject to conditional release supervision also may be monitored. [3] These offenders may be placed on electronic monitoring by court order or by the Parole Commission in the case of conditional release.

Department of Corrections' data shows that the habitual offender group has committed more serious crimes than the community control population. [4] As shown in Exhibit 2, for example, community control offenders are primarily property and drug offenders (67%) compared to the habitual or sex offender group, where sex and violent offenses predominate.

[3] Pursuant to s. 947.1405, *F.S.*, the conditional release program requires certain violent, habitual offenders to serve a mandatory term of supervision upon release from prison.

[4] The Department of Corrections provided data for all offenders under community supervision as of December 24, 2004, including primary offense, supervision type, and electronic monitoring status.

However, despite the seriousness of the habitual offender group, most of the electronic monitoring resources are being used on the community control population. As shown in Exhibit 3, of the 705 offenders on electronic monitoring on December 24, 2004, 70% (500) were community control offenders. Almost half of these persons (43%) were convicted of a property, drug, or other less serious crime. In contrast, only 30% of the offenders under electronic monitoring were habitual or sex offenders, who may pose a greater risk to the community. While some community control offenders with serious offense histories are on electronic monitoring, there are thousands of violent and sex offenders eligible for electronic monitoring who are not currently supervised using this technology.

The more prevalent use of electronic monitoring for community control offenders is a result of two factors. First, the decision to place offenders on electronic monitoring takes place primarily at sentencing, and prosecutors and judges have historically used this technology with community control offenders. Electronic monitoring was originally implemented in 1987 to provide additional surveillance to prison diversion cases. As a result, since its inception, electronic monitoring has been associated closely with community control.

Exhibit 2
Habitual and Sex Offenders Have Committed More Serious Crimes Than Community Control Offenders

Primary Offenses Committed by Community Control Population		
Property / fraud	3,844	(35%)
Drug offenses	3,503	(32%)
Other violent offenses	722	(7%)
Aggravated assault / battery	655	(6%)
Violent personal offenses	591	(5%)
Non-aggravated assault / battery	560	(5%)
Sexual battery, sexual violence against child	279	(3%)
Lewd and lascivious	273	(3%)
Other	333	(3%)
Murder / manslaughter	105	(1%)
Other sex offenses (e.g., prostitution, pornography)	97	(1%)
Total	10,962	(100%)

Primary Offenses Committed by Habitual and Sex Offenders (Conditional Release and Sex Offender Probation)		
Lewd and lascivious	1,773	(28%)
Sexual battery, sexual violence against child	1,472	(23%)
Violent personal offenses	754	(12%)
Property / fraud	615	(10%)
Drug offenses	480	(7%)
Aggravated assault / battery	295	(5%)
Other violent offenses	345	(5%)
Murder / manslaughter	221	(3%)
Other sex offenses (e.g., prostitution, pornography)	251	(4%)
Non-aggravated assault / battery	170	(3%)
Other	60	(1%)
Total	6,436	(100%)

Source: OPPAGA analysis of Department of Corrections data.

Exhibit 3
Most Offenders on Electronic Monitoring Are on Community Control

Primary Offenses Committed by Electronically Monitored Community Control Population		
Property / fraud	115	(23%)
Drug offenses	92	(18%)
Sexual battery, sexual violent against child	73	(15%)
Lewd and lascivious	71	(14%)
Aggravated assault / battery	37	(7%)
Other violent offenses	31	(6%)
Violent personal offenses	26	(5%)
Non-aggravated assault / battery	24	(5%)
Other sex offenses (e.g., prostitution, pornography)	14	(3%)
Other	10	(2%)
Murder / manslaughter	7	(1%)
Total	500	(100%)

Primary Offenses Committed by Electronically Monitored Habitual and Sex Offenders (Conditional Release and Sex Offender Probation)		
Lewd and lascivious	71	(35%)
Sexual battery, sexual violent against child	69	(34%)
Property / fraud	17	(8%)
Violent personal offenses	11	(5%)
Other violent offenses	11	(5%)
Murder / manslaughter	9	(4%)
Aggravated assault / battery	6	(3%)
Non-aggravated assault / battery	4	(2%)
Drug offenses	4	(2%)
Other	2	(1%)
Other sex offenses (e.g., prostitution, pornography)	1	(1%)
Total	205	(100%)

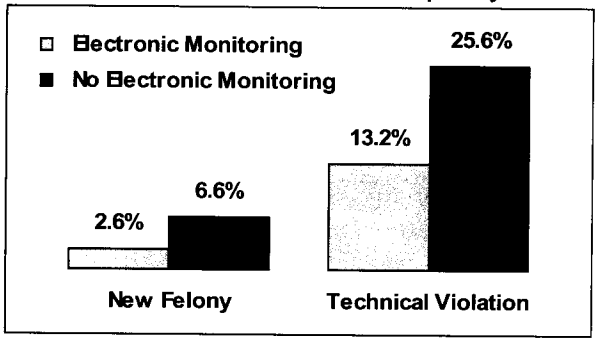
Source: OPPAGA analysis of Department of Corrections data.

Second, while the department has statutory authority to place offenders on electronic monitoring, it is reluctant to do so unless stipulated in an original court order. The department cites case law precedent it believes prohibits the department from revoking the community supervision status of an offender placed on electronic monitoring that was not court-ordered.[5] As a result, unless electronic monitoring was specified as part of an offender's original sentencing order, the department is not likely to place the offender on electronic monitoring.

Available data indicates that electronic monitoring is effective in supervising offenders

A 2003 department study showed that community control offenders supervised with electronic monitoring had fewer revocations than community control offenders who were not electronically monitored. As shown in Exhibit 4, community control offenders on electronic monitoring had lower new felony and technical revocation rates in the first year of monitoring compared to those on community control without electronic monitoring.

Exhibit 4
Community Control Offenders on Electronic Monitoring Were Revoked Less Frequently



Note: Results are from an analysis of the best-available historical data on offenders placed on community control and/or electronic monitoring from July 1, 1996, to June 30, 2000, at one year from the date of placement.

Source: Department of Corrections, *A Controlled Study of the Effects of Electronic Monitoring and Officer Caseload on Outcomes for Offenders on Community Control,* 3/11/03.

Active GPS provides greater surveillance of high-risk offenders, but an outcome study would help determine cost-effectiveness

While the department's effectiveness study used a valid research design, the study was unable to evaluate the comparative effectiveness of each type of monitoring technology. The department compared GPS and Radio Frequency monitoring, but was unable to draw any conclusions about the

[5] Westlaw, 531 So.2d 1069 (Carson v State of Florida) and 854 So.2d 1069 (Anthony v State of Florida).

relative outcomes of the different technologies, and it did not study the effectiveness of electronic monitoring on the more dangerous habitual or sex offenders.

This is important as the three technologies vary in terms of surveillance value, effect on workload, and cost.

Surveillance value. Active GPS provides the most intensive method for monitoring and supervising offenders in the community. Active GPS can monitor an offender's movement within a designated area as well as monitor whether an offender has entered a prohibited area, such as a school playground or a victim's geographic area. Detection and alert notification are immediate and the officer can attempt to contact the offender or alert law enforcement within minutes. In contrast, while Passive GPS can track offender movement, the officer does not learn of prohibited movement until the next day. Radio Frequency provides limited surveillance. Offenders currently being electronically monitored by this technique cannot be monitored while away from their residence and telephone, so it does not provide information on the whereabouts of offenders once they leave their homes.

Effect on workload. According to the department, Passive GPS creates the greatest workload for officers while Radio Frequency creates the least. Probation officers monitoring Passive GPS must sift through each day's prior data on offender movement to identify potential violations. Passive GPS also produces the highest number of incidents requiring probation officer follow-ups; often these incidents are "false alarms" in which the system temporarily lost contact with the offender. Offenders on Passive GPS produced 66 incidents requiring follow-up versus 23 per offender on Active GPS. To deal with this additional workload, the department has recommended reduced caseloads for officers monitoring offenders with Passive GPS. For example, while standard community control caseload is 25 offenders to one officer, the department recommended a caseload of 22 offenders to 1 officer for Radio Frequency, 17 offenders to 1 officer for those placed on Active GPS monitoring and 8 offenders to 1 officer for Passive GPS. [6]

Cost. At $2.34 a day, Radio Frequency is the least expensive monitoring technology, while Active GPS is the most expensive at $8.97 a day, and Passive GPS is roughly half as expensive as Active GPS at $4.25 a day. However, as shown in Exhibit 5, Passive GPS is not cost-effective when adjusting for officer workload.

Exhibit 5
Passive GPS Is Not Cost-Effective When Factoring in Additional Officer Workload

	RF	Active GPS	Passive GPS
Officer Ratio	22:1	17:1	8:1
Per Diem for Electronic Monitoring	$ 2.34	$ 8.97	$ 4.25
Per Diem for Additional Officer Workload	8.60	11.13	23.66
Total Per Diem	$11.00	$20.01	$27.91

Source: OPPAGA calculation using direct salary and benefits of a starting probation officer provided by the Department of Corrections.

Based on the surveillance value, Active GPS is best suited for the high-risk habitual and sex offenders. Radio Frequency may be appropriate for the lower risk community control offenders as a means to enforce a house arrest curfew. Given the relatively high cost of Passive GPS once officer costs are considered and its limited surveillance value, it is questionable whether this form of electronic monitoring should be continued; Active GPS has a lower total cost and provides much greater real time surveillance.

Conclusions and Recommendations

To make the most efficient use of the state's limited electronic monitoring resources, this technology should be targeted to those offenders who are the greatest risk to the public. We therefore recommend that electronic monitoring resources be shifted from less dangerous offenders to more dangerous

[6] *Report on the Use of Electronic Monitoring and Its Effectiveness on the Community Control Population, Department of Corrections,* February 1, 2004.

offenders. To this end, we recommend the actions discussed below.

- **The Legislature should consider modifying statute to provide that electronic monitoring is to be a standard condition of supervision used at the discretion of the department.** Currently, Florida law authorizes standard conditions of supervision for a number of community supervision programs.[7] These conditions include, for example, making contact with a probation officer, paying restitution, and submitting to drug testing. Electronic monitoring is a standard condition of community control, which means that both the judge and the department have authority under s. 948.11(1)(a), *Florida Statutes,* to place monitors on these offenders. We recommend that the Legislature add electronic monitoring to the list of standard conditions for offenders currently eligible for monitoring. Giving the department the specific authority to place offenders on and remove them from electronic monitoring should address the department's concerns about case law stated earlier in this report.
- **The department should use its offender risk assessment instrument to prioritize use of electronic monitoring.** To ensure that the department is placing the highest risk offenders under supervision, the department should use its risk assessment instrument to identify the most dangerous offenders in its custody and prioritize the use of electronic monitoring equipment. This validated risk assessment tool, based on a model developed by the National Institute of Justice, uses demographic and offense data to predict the likelihood of supervision failure, such as age, prior criminal history, and substance abuse problems.

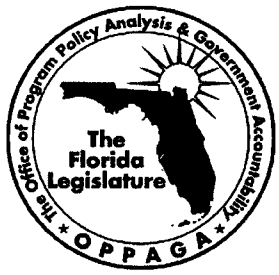
The department should use a valid research design to assess the effectiveness of electronic monitoring in deterring crime for all types of offenders, including habitual and sex offenders. The study should also compare the effectiveness of Active GPS and Radio Frequency monitoring for differing types of offenders.

The department should discontinue the use of Passive GPS given its relatively high total operating costs and more limited surveillance value. The department should shift these resources to monitor additional offenders using Active GPS and Radio Frequency monitoring, varying the mix of these technologies over time based on the characteristics of the offenders it under its supervision.

[7] For example, s. 948.101, *F.S.,* for community control, s. 948.03, *F.S.,* for probation.

The Florida Legislature

Office of Program Policy Analysis and Government Accountability



Visit the *Florida Monitor,* OPPAGA's online service. See www.oppaga.state.fl.us. This site monitors the performance and accountability of Florida government by making OPPAGA's four primary products available online.

- OPPAGA publications and contracted reviews, such as policy analyses and performance reviews, assess the efficiency and effectiveness of state policies and programs and recommend improvements for Florida government.
- Performance-based program budgeting (PB^2) reports and information offer a variety of tools. Program evaluation and justification reviews assess state programs operating under performance-based program budgeting. Also offered are performance measures information and our assessments of measures.
- Florida Government Accountability Report (FGAR) is an Internet encyclopedia of Florida state government. FGAR offers concise information about state programs, policy issues, and performance.
- Best Financial Management Practices Reviews of Florida school districts. In accordance with the *Sharpening the Pencil Act,* OPPAGA and the Auditor General jointly conduct reviews to determine if a school district is using best financial management practices to help school districts meet the challenge of educating their students in a cost-efficient manner.

Subscribe to OPPAGA's electronic newsletter, Florida Monitor Weekly, a free source for brief e-mail announcements of research reports, conferences, and other resources of interest for Florida's policy research and program evaluation community.

OPPAGA supports the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources. This project was conducted in accordance with applicable evaluation standards. Copies of this report in print or alternate accessible format may be obtained by telephone (850/488-0021 or 800/531-2477), by FAX (850/487-3804), in person, or by mail (OPPAGA Report Production, Claude Pepper Building, Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475). Cover photo by Mark Foley.

Florida Monitor: www.oppaga.state.fl.us

Project supervised by Marti Harkness (850/487-9233)

Project conducted by Richard Dolan (850/487-0872), Rose Cook, and Brian Underhill

Gary R. VanLandingham, OPPAGA Interim Director

E

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of County Government Responses

County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
		No	Yes	No	Yes	No	Yes	
Alachua	236,174	X						
Baker	23,963	X						
Bay	158,437		X	X		X		
Bradford	27,740		X	X		X		
Brevard	521,422		X	X		X		
Broward	1,723,131		X	X		X		
Calhoun	13,610		X	X		X		
Charlotte	156,985		X	X		X		
Citrus	129,110		X	X		X		
Clay	163,461		X	X		X		
Collier	306,186	X						
Columbia	60,453		X	X			X	See proposed ordinance.
De Soto	34,105	X						
Dixie	14,928		X	X		X		
Duval	840,474							Refer to City of Jacksonville.
Escambia	307,226	X						
Flagler	69,683		X	X		X		Proposed ordinance not yet final.
Franklin	10,649		X	X		X		
Gadsden	46,857	X						
Gilchrist	15,900		X	X		X		
Glades	10,733		X	X		X		
Gulf	16,171	X						
Hamilton	14,303		X	X		X		
Hardee	27,787		X	X		X		
Hendry	37,394		X	X			X	See proposed ordinance.
Hernando	145,207		X	X		X		
Highlands	92,057	X						
Hillsborough	1,108,435		X	X		X		A sheriff's policy has been adopted.
Holmes	19,012		X	X		X		
Indian River	126,829		X	X		X		
Jackson	48,870	X						
Jefferson	14,064		X	X		X		

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of County Government Responses

County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
		No	Yes	No	Yes	No	Yes	
Lafayette	7,535		X	X		X		
Lake	251,878		X	X			X	See proposed ordinance.
Lee	521,253		X	X		X		
Leon	263,896		X	X		X		
Levy	37,486	X						
Liberty	7,354		X	X		X		
Madison	19,498		X	X		X		
Manatee	295,242		X	X		X		
Marion	293,317	X						
Martin	137,637		X	X		X		Considering possible ordinance.
Miami-Dade	2,379,818		X	X			X	See proposed ordinance.
Monroe	81,236	X						
Nassau	65,016	X						
Okaloosa	185,778	X						
Okeechobee	38,004		X	X		X		
Orange	1,013,937	X						
Osceola	225,816		X		X	X		See Ordinance No. 05-28.
Palm Beach	1,242,270		X	X		X		
Pasco	389,776		X	X		X		
Pinellas	943,640		X	X		X		
Polk	528,389	X						
Putnam	73,226		X	X			X	See proposed ordinance.
Saint Johns	149,336	X						
Saint Lucie	226,216		X	X		X		
Santa Rosa	133,721		X	X		X		
Sarasota	358,307		X	X		X		
Seminole	403,361		X		X	X		See ordinance
Sumter	66,416		X	X		X		
Suwannee	37,713	X						
Taylor	20,941	X						
Union	14,620		X	X		X		
Volusia	484,261	X						

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of County Government Responses

County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
		No	Yes	No	Yes	No	Yes	
Wakulla	25,505	X						
Walton	50,543	X						
Washington	22,434		X	X		X		
Totals		**22**	**44**	**42**	**2**	**39**	**5**	
Response Rate			**67%**					

Note: The survey of all county governments was requested by staff of the House Judiciary Committee.

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Alachua	Alachua	7,121	X						
Altamonte Springs	Seminole	42,499	X						
Anna Maria	Manatee	1,848	X						
Apalachicola	Franklin	2,412	X						
Apopka	Orange	32,951		X		X	X		See Ordinance No. 1765.
Arcadia	De Soto	6,854	X						
Archer	Alachua	1,248		X	X		X		
Astatula	Lake	1,393	X						
Atlantic Beach	Duval	14,064		X		X	X		See Ordinance No. 57-05-22.
Atlantis	Palm Beach	2,151	X						
Auburndale	Polk	11,928	X						
Aventura	Miami-Dade	28,207	X						
Avon Park	Highlands	8,772		X	X		X		
Bal Harbour	Miami-Dade	3,409		X		X	X		See ordinance.
Baldwin	Duval	1,641		X	X		X		
Bartow	Polk	15,709		X	X		X		
Bay Harbor Islands	Miami-Dade	5,201		X		X	X		See Ordinance No. 774.
Belle Glade	Palm Beach	14,956		X	X		X		
Belle Isle	Orange	6,082		X	X			X	See proposed ordinance.
Belleair	Pinellas	4,107		X	X		X		
Belleair Beach	Pinellas	1,632		X	X		X		
Belleair Bluffs	Pinellas	2,240		X	X		X		
Belleview	Marion	3,692	X						
Biscayne Park	Miami-Dade	3,555	X						
Blountstown	Calhoun	2,452	X						
Boca Raton	Palm Beach	79,838		X		X	X		See Ordinance Nos. 4880 and 4893.
Bonifay	Holmes	2,677	X						
Bonita Springs	Lee	41,070		X	X		X		
Bowling Green	Hardee	3,072	X						
Boynton Beach	Palm Beach	65,208		X		X	X		See Ordinance No. 05-035.
Bradenton	Manatee	52,599	X						
Bradenton Beach	Manatee	1,513	X						
Brooksville	Hernando	7,279		X	X		X		Issue has been under discussion.
Bunnell	Flagler	2,239	X						
Bushnell	Sumter	2,265	X						
Callahan	Nassau	1,141		X	X		X		

62

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Callaway	Bay	14,808	X						
Cape Canaveral	Brevard	9,807	X						
Cape Coral	Lee	132,379	X						
Carrabelle	Franklin	1,306	X						
Casselberry	Seminole	24,741		X	X			X	Currently reviewing Seminole County's ordinance. Proposed ordinance has not yet been completed as of date of survey response
Cedar Grove	Bay	5,882		X	X		X		
Century	Escambia	1,728	X						
Chattahoochee	Gadsden	3,710		X	X		X		
Chiefland	Levy	2,031		X	X		X		
Chipley	Washington	3,554	X						
Clearwater	Pinellas	110,325		X	X		X		
Clermont	Lake	17,654	X						
Clewiston	Hendry	6,710	X						
Cocoa	Brevard	16,610	X						
Cocoa Beach	Brevard	12,850		X	X		X		
Coconut Creek	Broward	47,922		X		X	X		See Ordinance No. 2005-035.
Cooper City	Broward	29,020		X		X	X		See Ordinance No. 2005-08-01.
Coral Gables	Miami-Dade	44,345		X		X	X		See Ordinance No. 2005-13.
Coral Springs	Broward	126,711		X		X	X		See Ordinance No. 2005-110.
Crescent City	Putnam	1,787	X						
Crestview	Okaloosa	17,026	X						
Cross City	Dixie	1,801	X						
Crystal River	Citrus	3,685	X						
Dade City	Pasco	6,615	X						
Dania Beach	Broward	28,080		X		X	X		See Ordinance No. 2005-023.
Davenport	Polk	2,248	X						
Davie	Broward	81,845	X						
Daytona Beach	Volusia	65,077		X	X			X	See proposed ordinance.
Daytona Beach Shores	Volusia	4,568		X		X	X		LCIR staff requested ordinance.
DeBary	Volusia	17,856		X		X	X		See Ordinance No. 16-05.
Deerfield Beach	Broward	65,113		X		X	X		See Ordinance No. 2005-014.
DeFuniak Springs	Walton	5,207		X	X		X		

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
DeLand	Volusia	23,829		X	X			X	Will be considered for adoption on October 3, 2005.
Delray Beach	Palm Beach	63,439		X	X			X	See proposed ordinance.
Deltona	Volusia	80,052	X						
Destin	Okaloosa	12,015	X						
Doral	Miami-Dade	30,285	X						
Dundee	Polk	2,986		X		X	X		See Ordinance No. 05-77.
Dunedin	Pinellas	37,217		X	X		X		
Dunnellon	Marion	1,931	X						
Eagle Lake	Polk	2,511	X						
Eatonville	Orange	2,467	X						
Edgewater	Volusia	20,637	X						
Edgewood	Orange	2,160		X		X	X		See Ordinance No. 2005-04.
El Portal	Miami-Dade	2,550	X						
Eustis	Lake	16,884	X						
Fellsmere	Indian River	4,284		X	X		X		City attorney is researching issue.
Fernandina Beach	Nassau	11,541	X						
Flagler Beach	Flagler/Volusia	5,487		X		X	X		See Ordinance No. 2005-21.
Florida City	Miami-Dade	8,715	X						
Fort Lauderdale	Broward	170,297	X						
Fort Meade	Polk	5,828	X						
Fort Myers	Lee	57,585		X	X		X		
Fort Myers Beach	Lee	6,945		X	X		X		
Fort Pierce	Saint Lucie	39,044	X						
Fort Walton Beach	Okaloosa	20,619	X						
Freeport	Walton	1,234		X	X		X		
Frostproof	Polk	2,978	X						
Fruitland Park	Lake	3,335		X		X	X		See Ordinance No. 2005-025.
Gainesville	Alachua	117,754		X	X			X	Proposed ordinance has not yet been completed as of date of survey response
Graceville	Jackson	2,484		X	X		X		
Green Cove Springs	Clay	5,957		X	X		X		
Greenacres	Palm Beach	30,533		X	X		X		
Gretna	Gadsden	1,748		X	X		X		
Groveland	Lake	4,249		X		X	X		See Ordinance No. 2005-06-18.
Gulf Breeze	Santa Rosa	5,790	X						

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Gulfport	Pinellas	12,860		X	X		X		
Haines City	Polk	14,771	X						
Hallandale Beach	Broward	35,230		X		X	X		See Ordinance No. 2005-10.
Havana	Gadsden	1,745	X						
Haverhill	Palm Beach	1,516		X	X		X		
Hawthorne	Alachua	1,367		X	X		X		
Hialeah	Miami-Dade	233,566		X		X	X		See Ordinance No. 05-73.
Hialeah Gardens	Miami-Dade	20,441	X						
High Springs	Alachua	4,330	X						
Highland Beach	Palm Beach	4,019		X	X		X		
Hilliard	Nassau	2,853	X						
Hillsboro Beach	Broward	2,245	X						
Holly Hill	Volusia	12,612		X		X	X		See Ordinance No. 2741.
Hollywood	Broward	142,998	X						
Holmes Beach	Manatee	5,026		X	X		X		
Homestead	Miami-Dade	36,501		X		X	X		See Ordinance No. 2005-07-30.
Howey-in-the-Hills	Lake	1,057	X						
Hypoluxo	Palm Beach	2,472		X		X	X		See Ordinance No. 158.
Indialantic	Brevard	3,037		X	X		X		
Indian Harbour Beach	Brevard	8,661		X	X		X		
Indian River Shores	Indian River	3,647	X						
Indian Rocks Beach	Pinellas	5,288	X						
Indian Shores	Pinellas	1,796	X						
Inglis	Levy	1,637	X						
Interlachen	Putnam	1,496	X						
Inverness	Citrus	7,105		X	X		X		
Islamorada	Monroe	6,993	X						
Jacksonville	Duval	795,985		X		X	X		See Ordinance No. 2005-629-E.
Jacksonville Beach	Duval	21,544		X	X		X		
Jasper	Hamilton	1,719		X	X		X		
Juno Beach	Palm Beach	3,591		X	X		X		
Jupiter	Palm Beach	46,072		X	X		X		
Kenneth City	Pinellas	4,539		X	X		X		
Key Biscayne	Miami-Dade	11,160	X						
Key West	Monroe	26,215	X						
Keystone Heights	Clay	1,383	X						

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Kissimmee	Osceola	55,856		X		X	X		See Ordinance No. 05-28.
La Belle	Hendry	4,387		X	X			X	See proposed ordinance.
Lady Lake	Lake	12,666		X		X	X		See Ordinance No. 2005-44.
Lake Alfred	Polk	4,004	X						
Lake Butler	Union	1,933	X						
Lake City	Columbia	10,657		X	X		X		
Lake Clarke Shores	Palm Beach	3,473		X	X		X		
Lake Hamilton	Polk	1,379	X						
Lake Helen	Volusia	2,834	X						
Lake Mary	Seminole	13,792	X						
Lake Park	Palm Beach	9,105	X						
Lake Placid	Highlands	1,715		X	X		X		
Lake Wales	Polk	12,433		X	X			X	See proposed ordinance.
Lake Worth	Palm Beach	35,574		X		X	X		See Ordinance No. 2005-32.
Lakeland	Polk	89,731	X						
Lantana	Palm Beach	9,526		X		X	X		See Ordinance No. O-08-05.
Largo	Pinellas	72,817	X						
Lauderdale Lakes	Broward	31,752	X						
Lauderdale-by-the-Sea	Broward	6,278		X	X			X	LCIR staff requested copy of ordinance. Proposed ordinance has not yet been completed as of date of survey response
Lauderhill	Broward	57,936		X		X	X		LCIR staff requested copy of ordinance.
Leesburg	Lake	16,679		X		X	X		See Ordinance No. 05-70.
Lighthouse Point	Broward	10,857	X						
Live Oak	Suwannee	6,545	X						
Longboat Key	Manatee/Sarasota	7,665	X						
Longwood	Seminole	13,886		X		X	X		See Ordinance No. 05-1772.
Lynn Haven	Bay	14,776		X	X		X		
Macclenny	Baker	5,019	X						
Madeira Beach	Pinellas	4,504	X						
Madison	Madison	3,095		X	X		X		
Maitland	Orange	16,476		X		X	X		See Ordinance No. 1116.
Malabar	Brevard	2,782	X						
Malone	Jackson	2,041	X						
Mangonia Park	Palm Beach	2,519		X	X		X		

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Marathon	Monroe	10,391	X						
Marco Island	Collier	15,576		X	X		X		
Margate	Broward	54,455		X		X	X		See Ordinance Nos. 2005-08, 2005-10.
Marianna	Jackson	6,444	X						
Mary Esther	Okaloosa	4,211		X	X		X		
Mascotte	Lake	3,739		X	X			X	See Ordinance No. 2005-08-400.
Mayo	Lafayette	1,022	X						
Medley	Miami-Dade	1,123	X						
Melbourne	Brevard	74,644		X	X			X	See proposed ordinance.
Melbourne Beach	Brevard	3,422	X						
Mexico Beach	Bay	1,107	X						
Miami	Miami-Dade	379,550	X						
Miami Beach	Miami-Dade	91,540		X		X	X		See ordinance.
Miami Gardens	Miami-Dade	105,414		X		X	X		See Ordinance No. 2005-19-57.
Miami Lakes	Miami-Dade	24,835		X		X	X		See Ordinance No. 05-71.
Miami Shores	Miami-Dade	10,462		X	X			X	See proposed ordinance.
Miami Springs	Miami-Dade	13,783		X		X	X		See Ordinance No. 927-2005.
Midway	Gadsden	1,487	X						
Milton	Santa Rosa	7,512	X						
Minneola	Lake	7,838		X		X	X		See Ordinance No. 2005-34.
Miramar	Broward	101,813	X						
Monticello	Jefferson	2,537		X	X		X		
Montverde	Lake	1,080	X						
Moore Haven	Glades	1,650	X						
Mount Dora	Lake	10,758		X		X	X		See Ordinance No. 878.
Mulberry	Polk	3,402		X	X			X	See proposed ordinance.
Naples	Collier	22,443	X						
Neptune Beach	Duval	7,240	X						
New Port Richey	Pasco	16,334	X						
New Smyrna Beach	Volusia	21,334	X						
Newberry	Alachua	3,960		X	X		X		
Niceville	Okaloosa	12,791	X						
North Bay	Miami-Dade	6,614		X		X	X		See Ordinance No. 2005-09.
North Lauderdale	Broward	40,281		X		X	X		See Ordinance No. 05-07-1135.
North Miami	Miami-Dade	60,101		X		X	X		See Ordinance No. 1184.
North Miami Beach	Miami-Dade	42,359		X		X	X		See Ordinance No. 2005-9.

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
North Palm Beach	Palm Beach	12,535		X		X	X		See Ordinance No. 26-2005.
North Port	Sarasota	35,721		X	X		X		
North Redington Beach	Pinellas	1,543		X	X		X		
Oak Hill	Volusia	1,841	X						
Oakland	Orange	1,678	X						
Oakland Park	Broward	31,810	X						
Ocala	Marion	47,371	X						
Ocean Ridge	Palm Beach	1,657	X						
Ocoee	Orange	29,215		X	X		X		Establishing a committee to review the issue.
Okeechobee	Okeechobee	5,458	X						
Oldsmar	Pinellas	13,737		X	X		X		
Opa-locka	Miami-Dade	16,116	X						
Orange City	Volusia	7,900		X		X	X		See Ordinance No. 252.
Orange Park	Clay	9,093	X						
Orlando	Orange	208,900		X	X			X	Proposed ordinance has not yet been completed as of date of survey response
Ormond Beach	Volusia	39,009		X		X	X		See Ordinance No. 2005-36.
Oviedo	Seminole	29,928		X		X	X		See Ordinance Nos. 1310, 1315.
Pahokee	Palm Beach	6,240		X	X		X		
Palatka	Putnam	10,820		X	X		X		Issue has been under discussion.
Palm Bay	Brevard	88,572		X		X		X	See enacted Ordinance No. 2005-60; proposed Ordinance Nos. 2005-61, 2005-62.
Palm Beach	Palm Beach	9,662		X	X		X		
Palm Beach Gardens	Palm Beach	42,384		X	X		X		
Palm Beach Shores	Palm Beach	1,474		X	X		X		
Palm Coast	Flagler	50,484	X						
Palm Springs	Palm Beach	13,853		X	X		X		
Palmetto	Manatee	13,035		X	X		X		
Palmetto Bay	Miami-Dade	24,903		X		X	X		See Ordinance No. 05-05.
Panama City	Bay	37,207	X						
Panama City Beach	Bay	8,322		X	X		X		
Parker	Bay	4,648	X						
Parkland	Broward	19,374		X		X	X		See Ordinance No. 2005-15.
Pembroke Park	Broward	5,708	X						
Pembroke Pines	Broward	150,435	X						

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Pensacola	Escambia	56,366	X						
Perry	Taylor	6,823	X						
Pierson	Volusia	2,636	X						
Pinecrest	Miami-Dade	19,317	X						
Pinellas Park	Pinellas	47,572		X	X		X		
Plant City	Hillsborough	32,002		X	X		X		
Plantation	Broward	84,604	X						
Polk City	Polk	1,720	X						
Pompano Beach	Broward	87,184		X		X	X		See Ordinance No. 2005-275.
Ponce Inlet	Volusia	3,160		X	X		X		
Port Orange	Volusia	53,217		X	X		X		Has sexual offender accountability system.
Port Richey	Pasco	3,167	X						
Port Saint Joe	Gulf	3,661		X	X		X		
Port Saint Lucie	Saint Lucie	115,155		X	X		X		No proposal yet, in early stages of review.
Punta Gorda	Charlotte	17,168		X	X		X		Has sexual offender monitoring program.
Quincy	Gadsden	7,340	X						
Redington Beach	Pinellas	1,592		X	X		X		
Redington Shores	Pinellas	2,341		X	X		X		
Riviera Beach	Palm Beach	32,916	X						
Rockledge	Brevard	23,383		X	X		X		
Royal Palm Beach	Palm Beach	29,261		X		X	X		See Ordinance No. 725.
Safety Harbor	Pinellas	17,800		X	X		X		
Saint Augustine	Saint Johns	13,363	X						
Saint Augustine Beach	Saint Johns	5,578		X	X		X		
Saint Cloud	Osceola	24,392		X		X	X		LCIR staff requested ordinance.
Saint Petersburg	Pinellas	253,010		X	X		X		
Saint Petersburg Beach	Pinellas	10,004		X	X		X		
Sanford	Seminole	46,078		X	X			X	See Proposed Ordinance No. 3941.
Sanibel	Lee	6,335	X						
Sarasota	Sarasota	54,639		X	X		X		
Satellite Beach	Brevard	10,860	X						
Sebastian	Indian River	19,365		X	X		X		
Sebring	Highlands	10,039		X	X		X		
Seminole	Pinellas	17,799		X	X		X		
Sewall's Point	Martin	1,991		X	X		X		
Sneads	Jackson	1,960		X	X		X		

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
South Bay	Palm Beach	4,079	X						
South Daytona	Volusia	13,945	X						
South Miami	Miami-Dade	10,891		X	X		X		
South Palm Beach	Palm Beach	1,531		X	X		X		
South Pasadena	Pinellas	5,837		X	X		X		
Southwest Ranches	Broward	7,443		X	X		X		
Springfield	Bay	8,925	X						
Starke	Bradford	5,582	X						
Stuart	Martin	15,922	X						
Sunny Isles Beach	Miami-Dade	16,580	X						
Sunrise	Broward	88,976	X						
Surfside	Miami-Dade	5,564	X						
Sweetwater	Miami-Dade	14,267		X		X	X		See Ordinance No. 3177.
Tallahassee	Leon	169,136		X	X		X		
Tamarac	Broward	57,726		X		X	X		See Ordinance No. 2005-18.
Tampa	Hillsborough	323,663		X	X		X		
Tarpon Springs	Pinellas	23,170	X						
Tavares	Lake	10,938		X	X		X		
Temple Terrace	Hillsborough	21,949	X						
Tequesta	Palm Beach	5,648		X	X		X		
Titusville	Brevard	43,029		X	X		X		
Treasure Island	Pinellas	7,532		X	X		X		
Trenton	Gilchrist	1,631		X	X		X		
Umatilla	Lake	2,405		X		X	X		See Ordinance No. 2005-J.
Valparaiso	Okaloosa	6,492		X	X		X		
Venice	Sarasota	20,035		X	X		X		
Vero Beach	Indian River	18,012	X						
Virginia Gardens	Miami-Dade	2,356	X						
Wauchula	Hardee	4,405		X	X		X		
Wellington	Palm Beach	49,582	X						
West Melbourne	Brevard	13,869		X	X		X		
West Miami	Miami-Dade	6,132		X		X	X		See Ordinance No. 2005-03.
West Palm Beach	Palm Beach	97,708		X	X		X		
Weston	Broward	60,636		X		X	X		See Ordinance No. 2005-08.
Wewahitchka	Gulf	1,728		X	X		X		City is looking for a model ordinance.
Wildwood	Sumter	3,987	X						

Florida Legislative Committee on Intergovernmental Relations

FAXNET Survey: Local Ordinances Directed to Sexual Predators or Offenders

Summary of Municipal Government Responses

Municipality	Respective County	2004 Population Estimate	Response Received		Enacted Local Ordinance?		Proposed Local Ordinance?		Comments
			No	Yes	No	Yes	No	Yes	
Williston	Levy	2,327	X						
Wilton Manors	Broward	12,282		X		X	X		See Ordinance No. 872.
Windermere	Orange	2,329	X						
Winter Garden	Orange	22,242	X						
Winter Haven	Polk	27,885	X						
Winter Park	Orange	26,860		X		X	X		See Ordinance No. 2638-05.
Winter Springs	Seminole	32,955	X						
Zephyrhills	Pasco	11,828		X	X		X		
Zolfo Springs	Hardee	1,662	X						
Totals			**146**	**175**	**114**	**61**	**159**	**16**	
Response Rate				**55%**					

Notes:

1) The survey was requested by staff of the House Judiciary Committee.

2) At the staff's request, only those municipalities having a total population greater than 1,000 were surveyed. In total, 321 municipalities were surveyed.

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
1	Apopka	Those convicted under 794.011, 800.04, 827.071, 847.0145 in which victim < 16 y.o.	2500'	y	y	y, if prior to ordinance		y		y	y			y			$500/60 d.; $1000/1 y.	y
2	Atlantic Beach	Those required to register as a sexual predator by Florida law	2500'	y	y	y, if prior to 10/10/05		y		y	y	y	y				per Code	
3	Bal Harbor Village	Those convicted of any felony sex offense in any state where victim < 16 y.o.	1300'		y	y, if prior to ordinance				y	y	y					$500/60 d.	y
4	Bay Harbor Islands	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to ordinance		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	
5	Belle Isle (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < or = 18 y.o.	2500'			y, if prior to ordinance, but applies at lease expiration or termination		y	y	y	y			y	y		$500/60 d.	
6	Boca Raton	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 6/28/05		y	y	y	y		y	y			per Code	y
7	Boynton Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 7/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	
8	Casselberry (n/a)																	
9	Coconut Creek	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 9/23/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

2

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
10	Columbia County (proposed)	Sexual offenders as per 944.606(1), whose victim was < 16 y.o.; sexual predator as per 775.21	2500'	y	y (as to school, park, playground, daycare)	y, if prior to ordinance, but applies at expiration of lease term		y	y	y	y			y			$500/60 d.	y (but includes two rebuttable presumptions)
11	Cooper City	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to ordinance (8/17/05)		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
12	Coral Gables	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 7/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
13	Coral Springs	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 7/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
14	Dania Beach	Those convicted of any felony sex offense in any state where victim < 16 y.o.	2500'		y (as to school, park, playground, daycare)	y, if prior to ordinance		y		y	y			y			$500/60 d.	y
15	Daytona Beach (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'			y, except applies at lease expiration or termination		y		y	y		y	y		Church		
16	Debary	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 8/1/05, but applies at lease expiration or termination		y		y	y		y	y		Church	$500/60 d.	y
17	Deerfield Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 7/1/05		y	y	y	y			y			$500/60 d.; $1000/1 y.	y
18	DeLand (n/a)																	

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
19	Delray Beach (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'	y	y (as to school, bus stop, park, daycare)	y, if prior to ordinance		y	y	y				y			per Code	
20	Dundee	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.				y, except applies at lease expiration or termination		y	y	y	y		y	y		Church, museums	$500/60 d.	
21	Duval County	Those required by Florida law to register as a sexual predator	2500'	y	y (as to school, library, and daycare)	y		y		y	y		y	y	y		Class D offense	
22	Edgewood	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1000'	y		y, if prior to ordinance, but applies at expiration of lease term		y		y	y		y	y		Church		y
23	Flagler Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 8/1/05, but applies at lease expiration or termination		y		y	y		y	y		Church	$500/60 d.	y
24	Fruitland Park	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'			y, if prior to ordinance, but applies at lease expiration or termination		y	y	y	y		y	y		Church	$500/60 d.; $1000/1 y.	
25	Gainesville (n/a)																	
26	Glades County	Those required by Florida law or place of residence to register as a sexual predator or offender																

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
27	Groveland	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'	y	y	y, if prior to ordinance, but applies at lease expiration or termination		y	y	y	y			y			$500/60 d.; $1000/1 y	
28	Hallendale Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to ordinance		y	y	y	y			y			$500/60 d.	y
29	Hendry County (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school bus stops and daycare)	y, if prior to ordinance		y	y	y	y			y	y		$500/60 d.; $1000/1 y	y
30	Hialeah	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2000'			Person has one year to find place of residence in compliance w/restriction; may apply for a one-time extension of up to one year	Person may petition for exemption for economic or noneconomic hardship or other justifiable circumstances such as length of time since offense, rehabilitation, mitigating facts, life history after the offense, and nature of the offense	y	y	y				y		Maps must be available for inspection	$500/60 d.	
31	Hillsborough County																	
32	Holly Hill	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to the ordinance		y		y	y			y				

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers									
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
33	Homestead	Those convicted of any felony sex offense in any state where victim < 16 y.o.	2500'		y	y, if prior to the ordinance		y		y				y			$500/60 d.	y
34	Hypoluxo (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'	y	y (as to everything but "where children congregate")	y, if prior to the ordinance		y	y	y	y		y	y	y		$500/60 d.; $1000/1 y.	y
35	Kissimmee	Those required by Florida law to register as a sexual predator or convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < or = 16 y.o.	2500'	y (all except as to bus stops and church)	y (all except as to bus stops and church)	y, if prior to the ordinance as to all except bus stops and church and until lease expiration or termination		y	y	y	y		y	y	y	Church	$500/60 d.; $1000/1 y.	
36	LaBelle (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, bus stop, daycare)	y, if prior to 9/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
37	Lady Lake	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'	y (all except as to churches)	y (all except as to churches)	y, if prior to the ordinance and as to all except churches and until lease expiration or termination		y		y	y		y	y		Church	$500/60 d.; $1000/1 y	
38	Lake County (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'				Applies to any person for offenses occurring on/after 1/1/06	y		y	y			y			Misd., punishable as in S.125.69, F.S.	

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers									
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
39	Lake Wales (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to the initial offense subjecting person to ordinance, but applies at lease expiration or termination		y	y	y	y		y	y		Church	$500/60 d.; $1000/1 y.	y
40	Lake Worth	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'	y	y	y, if prior to 10/4/05		y	y	y	y		y	y			$500/60 d.; $1000/1 y.	y
41	Lantana	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'	y	y	y, if prior to 9/26/05		y	y	y	y		y	y			$500/60 d.; $1000/1 y.	y
42	Lauderdale-by-the-Sea (n/a)																	
43	Leesburg	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to the initial offense subjecting person to ordinance, but applies at lease expiration or termination		y		y	y		y	y			$500/60 d.; $1000/1 y	y
44	Longwood	Sexual offenders as per 944.606(1), whose victim was < 16 y.o.; sexual predator as per 775.21, whose victim was < 16 y.o.	1000'	y	y	y, if prior to ordinance, but applies at expiration of lease term		y		y	y			y			Ch. 162 code enforcement, among others	

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

23

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers									
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
45	Maitland	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'			y, except applies at lease expiration or termination	Applies to any person for offenses occurring on/after 10/1/04	y		y	y		y	y		Church	$500/60 d.	
46	Margate	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to ordinance		y	y	y	y			y			$500/60 d.	y
47	Mascotte (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'	y	y	y, if prior to ordinance, but applies at lease expiration or termination		y		y	y		y	y		Church	$500/60 d.; $1000/1 y	
48	Melbourne (proposed)	Sexual offenders as per 943.0435, whose victim was < 16 y.o.; sexual predator as per 775.21, whose victim was < 16 y.o.	2000'	y	y	y, if prior to 12/1/05		y		y				y			per Code	y
49	Miami Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 7/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers									
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
50	Miami-Dade County (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'; cannot be present at all at park if child < 16 y.o. is present and signs shall be posted to that effect; also not allowed to remain at daycare facility unless under supervision	y	y	y, if prior to 11/1/05		y									$500/60 d.; $1000/1 y.	y; requires written confirmation from FDLE
51	Miami Gardens	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'				Applies to persons convicted on/after 10/1/04	y	y	y	y				y		$500/60 d.; $1000/1 y.	
52	Miami Lakes	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 7/12/05		y	y	y	y			y			$500/60 d.; $1000/1 y.	
53	Miami Shores (proposed)	Those convicted of any felony sex offense in any state where victim < 16 y.o.	2500'	y	y	y, if prior to ordinance		y		y	y			y			$500/60 d.	y

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
54	Miami Springs	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 7/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
55	Minneola	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'			y, except applies at lease expiration or termination		y	y	y	y		y	y		Church	$500/60 d.; $1000/1 y.	
56	Mount Dora	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 7/6/05		y	y	y	y		y	y	y	Church	$500/60 d.; $1000/1 y.	y
57	Mulberry (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to all but parks and playgrounds)	y, if prior to ordinance		y	y	y	y			y	y			y
58	North Bay Village	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y (as to all but marina)	y (as to all but marina)	y, if prior to 7/12/05, as to all but marina		y	y	y	y			y	y	Marina	$500/60 d.; $1000/1 y.	y
59	North Lauderdale	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 7/1/05, as to all but marina		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
60	North Miami	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	3000'	y	y	y, if prior to ordinance		y	y	y	y			y	y		$500/60 d.; $1000/1 y.	y
61	North Miami Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y		y, if prior to ordinance											$500/60 d.; $1000/1 y.	

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

98

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
62	North Palm Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'			y, if prior to ordinance		y	y	y	y			y		Public pool	per Code	
63	Orange City	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y	y, if prior to 8/1/05		y		y	y		y	y		Recreational open spaces; church	$500/60 d.	y
64	Orlando (n/a)																	
65	Ormond Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'		y	y, if prior to ordinance until lease expiration or termination		y	y	y	y	y	y	y	y	Recreational open spaces; church	$500/60 d.; $1000/1 y.	y
66	Osceola County	Those required by Florida law to register as a sexual predator or convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < or = 16 y.o.	2500'	y (all except as to bus stops and church)	y (all except as to bus stops and where children congregate)	y, if prior to ordinance and as to all except bus stops, where children congregate, and church and until lease expiration or termination		y	y	y	y		y	y	y	Church	$500/60 d.; $1000/1 y.	
67	Oviedo	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < or = 16 y.o.	2500'	y	y	y, if prior to 6/6/05, and except applies at lease expiration or termination		y		y	y		y	y		Church	$500/60 d.; $1000/1 y.	y
68	Palm Bay (proposed)																	
69	Village of Palmetto Bay	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'					y		y	y			y			$500/60 d.; $1000/1 y	

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

12

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers									
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
70	Parkland	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to schools, school bus stops, and daycare)	y, if prior to 7/1/05		y	y	y	y			y		Multi-purpose trail system	$500/60 d.; $1000/1 y	y
71	Pompano Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to schools, school bus stops, and daycare)	y, if prior to ordinance		y	y	y	y			y			$500/60 d.	y
72	Putnam County (proposed)	Those required by Florida law to register as a sexual predator or sexual offender under Florida law in which victim < 16 y.o.	2500'					y	y	y	y			y	y		$500/60 d.	
73	Royal Palm Beach	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	1500'	y	y (as to all but where children congregate)	y, if prior to 9/7/05		y		y	y		y	y			$500/60 d.; $1000/1 y	y
74	Sanford (proposed)	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < or = 16 y.o.	2500'	y	y	y, if prior to 8/1//05, and except applies at lease expiration or termination		y		y	y		y	y		Private recreational open spaces; facilities and areas within subdivisions; church	$500/60 d.	y
75	Seminole County	Sexual offenders as per 944.606(1), whose victim was < 16 y.o.; sexual predator as per 775.21	1000'	y	y	y, except applies at lease expiration	Predator or offender was under the age of 18	y		y	y			y			$500/60 d.	y (but includes two rebuttable presumptions)

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

Local Government Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

				Exceptions				Facility markers										
	County/City	Applicability	Distance limit	Minor	Opened after residence	Current residence	Other	S	Bs	Pk	Pl	B	L	D	CC	Other	Sanctions	Owner liability?
76	Sweetwater	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, school bus stop, and daycare)	y, if prior to 8/12/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y	y (must also obtain background check from city; sanction of $1500 and up to $3K for a subsequent violation; establishes hearing process
77	Tamarac	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 16 y.o.	2500'	y	y (as to school, school bus stop, and daycare)	y, if prior to 9/1/05		y	y	y	y			y	y		$500/60 d.; $1000/1 y	y
78	Umatilla	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'	y	y	y, if prior to ordinance, but applies at lease expiration or termination		y		y	y		y	y		Church	$500/60 d.; $1000/1 y	
79	Weston	Those convicted of any felony sex offense in any state where victim < 16 y.o.	2500'		y	y, if prior to ordinance		y	y	y	y			y			$500/60 d.	y
80	West Miami	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'				Applies to persons convicted of offenses occurring on/after 10/1/04	y	y	y	y			y	y		$500/60 d.; $1000/1 y	
81	Winter Park	Those convicted under 794.011, 800.04, 827.071, 847.0145, in which victim < 18 y.o.	2500'	y	y	y, if prior to ordinance		y		y	y			y			$500/60 d.; $1000/1 y	y

Legend

y= Yes S= School Bs= Bus stop Pk= Park
Pl= Playground B= Beach L= Library D= Daycare
CC= Where children congregate (n/a)= Ordinance not provided as of survey date

68

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

		Travel								
	County/City	Restrictions	Exceptions	Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
1	Apopka									
2	Atlantic Beach									
3	Bal Harbor Village									
4	Bay Harbor Islands									
5	Belle Isle (proposed)									
6	Boca Raton									
7	Boynton Beach									
8	Casselberry (n/a)									
9	Coconut Creek									
10	Columbia County (proposed)	No travel within 2500' buffer zone surrounding any school, daycare, park, playground	Meet w/ atty, attend social service interview, comply w/ct order, contact criminal justice personnel, attend church, attend school as student, medical visits, familial or parental obligations, employment, refuge during disasters		At public shelters, attending school or day care function			Sheriff to issue card; all must carry at all times	Sheriff must provide, but not a defense	
11	Cooper City									
12	Coral Gables									
13	Coral Springs									
14	Dania Beach									
15	Daytona Beach									
16	Debary									

Legend

(n/a)= Ordinance not provided as of survey date

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
17	Deerfield Beach									
18	DeLand (n/a)									
19	Delray Beach									
20	Dundee									
21	Duval County					Must notify those upon entering shelter for assignment to a shelter specifically for similar offenders; Sheriff may designate jail or other location for such purpose; failure to notify is a Class D offense under code				
22	Edgewood	No travel within 1000' buffer surrounding any school, daycare, park, playground, library, or church	Same as Columbia County							
23	Flagler Beach									
24	Fruitland Park									
25	Gainesville (n/a)									

Legend

(n/a)= Ordinance not provided as of survey date

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
26	Glades County					Must notify law enforcement officers on duty at the shelter and those operating the shelter upon entry, and also register. May be assigned to a shelter specifically for similar offenders or to a specific location within the shelter; up to $500 fine/60 d. in jail for violation				
27	Groveland									
28	Hallandale Beach			May not be present at school w/ students < 18 y.o., designated school bus stop, day care, public park, or playground, unless the person is the parent of the child in the park; sanction of $500 and/or 60 d.						Sign must be posted at facilities in which sex offenders or predators may not be present; Police Chief may provide other forms of community notice such as internet, cable TV, mailings, leaflets, etc.

Legend

(n/a)= Ordinance not provided as of survey date

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

		Travel								
	County/City	Restrictions	Exceptions	Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
29	Hendry County (proposed)					Not allowed, but must be allowed temporary shelter at the jail				
30	Hialeah									
31	Hillsborough County					Not allowed (will be treated as trespass) (Policy adopted by motion of BOCC)				Posting photos and personal info of sexual predators living w/in 5 miles of county parks (Policy adopted by mtion of BOCC)
32	Holly Hill									
33	Homestead									
34	Hypoluxo (proposed)									

Legend

(n/a)= Ordinance not provided as of survey date

93

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
35	Kissimmee					Must notify those upon entering shelter for assignment to a shelter specifically for similar offenders; Sheriff may designate jail or other location for such purpose; failure to notify is a Class D offense per code				
36	LaBelle (proposed)					Not allowed, but may be allowed temporary shelter at the jail				
37	Lady Lake									
38	Lake County (proposed)									
39	Lake Wales (proposed)									
40	Lake Worth									
41	Lantana									
42	Lauderdale-by-the-Sea									
43	Leesburg									

Legend

(n/a)= Ordinance not provided as of survey date

46

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
44	Longwood	No travel within 1000' buffer zone surrounding any school, daycare, park, playground	Meet w/ atty, attend social service interview, comply w/ct order, contact criminal justice personnel, attend church, attend school as student, medical visits, familial or parental obligations, employment, refuge during disasters	Cannot congregate or remain w/in 100' of any school bus stop between 6-9 am and 2-5 pm during any school day	At public shelters, attending school or day care function			Sheriff to issue card; all must carry at all times	Sheriff must provide, but not a defense	
45	Maitland							Police complete a "field contact card" for each sexual off/pred encountered to include nature of activity involved in at time, location of contact, names of others present, whether registered, place of employment, drivers license, etc.		Yes, annually by Police Chief
46	Margate									
47	Mascotte (proposed)									

Legend

(n/a)= Ordinance not provided as of survey date

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
48	Melbourne (proposed)				At public shelters	Must notify those upon entering shelter for assignment to a shelter specifically for similar offenders; City Manager may designate jail or other location for such purpose; failure to notify punishable as per Code		Must register w/police and provide name, social security number, age, etc.; school attending if any, and any other info. desired by police. Incl. timeframes for registration and re-registration.		
49	Miami Beach									
50	Miami-Dade County (proposed)									
51	Miami Gardens									
52	Miami Lakes									City shall notify all residents w/in 2 miles when such person establishes residence
53	Miami Shores (proposed)									
54	Miami Springs					Not allowed, but may be allowed temporary shelter at the jail				
55	Minneola									

Legend

(n/a)= Ordinance not provided as of survey date

96

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

		Travel								
	County/City	Restrictions	Exceptions	Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
56	Mount Dora									
57	Mulberry (proposed)									
58	North Bay Village									
59	North Lauderdale									
60	North Miami									City to post convicted offenders and predators on city web page and keep it updated; also, city will notify residents by mail of all offenders/ predators and w/in a 1.5 mile radius of resident's home, and post FDLE flyers at all city and educational facilities
61	North Miami Beach									
62	North Palm Beach									
63	Orange City									
64	Orlando (n/a)									
65	Ormond Beach									

Legend

(n/a)= Ordinance not provided as of survey date

07

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
66	Osceola County					Must notify those upon entering shelter for assignment to a shelter specifically for similar offenders; county may designate jail or other location for such purpose; failure to notify is a punishable offense				
67	Oviedo									

Legend

(n/a)= Ordinance not provided as of survey date

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
68	Palm Bay (proposed)						Requires employers to provide written notice to the property owner whenever directing an employee classified as a sexual predator to a designated location to provide services or repairs before they enter the property; property owner must acknowledge notification; applies to self-employed persons as well; makes provision for emergency repairs or services; punishable as 2d degree misd for 1st offense	Police may take certain action when a sexual predator or offender as defined in Florida law relocates within city, including entering name into database, verifying address and employment info., meeting with the person, notifying the community through profile sheets to residences, chuirches, schools, and daycare		Provide profile sheets to residences, chuirches, schools, and daycare
69	Village of Palmetto Bay									
70	Parkland									
71	Pompano Beach									
72	Putnam County (proposed)									
73	Royal Palm Beach									

Legend

(n/a)= Ordinance not provided as of survey date

99

Local Government Provisions Other Than Residency Restrictions

Prepared by staff of the House Judiciary Committee (12/6/05)

	County/City	Travel		Other mobility restrictions	Required declarations	Use of shelters	Employment restrictions	Monitoring/photo Id. cards/other	Courtesy maps	Community notification
		Restrictions	Exceptions							
74	Sanford (proposed)									
75	Seminole County	No travel within 1000' buffer zone surrounding any school, daycare, park, playground; but nothing prohibits travel on Florida Intrastate Highway System located within county	Meet w/ atty, attend social service interview, comply w/ct order, contact criminal justice personnel, attend church, attend school as student, medical visits, familial or parental obligations, employment, refuge during disasters		At public shelters, attending school or day care function			Sheriff to issue card; all must carry at all times	Sheriff must provide, but not a defense	
76	Sweetwater									
77	Tamarac									
78	Umatilla									
79	Weston									
80	West Miami									
81	Winter Park									

Legend

(n/a)= Ordinance not provided as of survey date

Briefs and Other Related Documents

Supreme Court of the United States
Delbert W. SMITH and Bruce M. Botelho,
Petitioners,
v.
John DOE I, et al.
No. 01-729.

Argued Nov. 13, 2002.
Decided March 5, 2003.
Rehearing Denied April 28, 2003.
See 538 U.S. 1009, 123 S.Ct. 1925.

Convicted sex offenders, and wife of one of offenders, brought § 1983 action challenging constitutionality of Alaska Sex Offender Registration Act (SORA) as a violation of the ex post facto clause. Following reversal of determination that plaintiffs would not be allowed to proceed under pseudonyms, 884 F.Supp. 1372, parties cross-moved for summary judgment. The United States District Court for the District of Alaska, H. Russell Holland, J., granted summary judgment to state. Plaintiffs appealed. The Court of Appeals, 259 F.3d 979, reversed and remanded. On grant of certiorari, the Supreme Court, Justice Kennedy, held that the Act was nonpunitive and therefore its retroactive application did not violate the ex post facto clause.

Reversed and remanded.

Justice Thomas filed a concurring opinion.

Justice Souter filed an opinion concurring in the judgment.

Justice Stevens filed a dissenting opinion.

Justice Ginsberg filed a dissenting opinion in which Justice Breyer joined.

West Headnotes

[1] Constitutional Law 197
92k197 Most Cited Cases
In considering whether a law constitutes retroactive punishment forbidden by the Ex Post Facto Clause, a court must ascertain whether the legislature meant the statute to establish civil proceedings; if the intention of the legislature was to impose punishment, that ends the inquiry, but if the intention was to enact a regulatory scheme that is civil and nonpunitive, the court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[2] Constitutional Law 197
92k197 Most Cited Cases
For purpose of determining whether a law constitutes retroactive punishment forbidden by the Ex Post Facto Clause, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[3] Action 18
13k18 Most Cited Cases
Whether a statutory scheme is civil or criminal is first of all a question of statutory construction; a court considers the statute's text and its structure to determine the legislative objective.

[4] Mental Health 469(1)
257Ak469(1) Most Cited Cases
An imposition of restrictive measures on sex offenders adjudged to be dangerous was a legitimate nonpunitive governmental objective of state's Sex Offender Registration Act (SORA), even if that objective was consistent with the purposes of the state's criminal justice system. AS 12.63.010 et seq.

[5] Action 18
13k18 Most Cited Cases
Formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative, but not dispositive, of the legislature's intent as to whether a statute is civil or criminal.

[6] Constitutional Law 203
92k203 Most Cited Cases

[6] Mental Health 433(2)
257Ak433(2) Most Cited Cases

For purpose of ex post facto analysis, intent of Alaska Legislature in adopting Sex Offender Registration Act (SORA) was to create a civil, nonpunitive regime; although the Act's registration provisions were codified in state's criminal code, some of the Act's provisions related to criminal administration, and the state's criminal pleading rule required informing a defendant of the Act's requirements, the Act's stated objective of protecting the public from sex offenders was nonpunitive, the Act contained many provisions not involving criminal punishment, parts of the Act were codified in civil provisions, and the Act mandated no procedures other than duty to register, and instead vested authority to promulgate implementing regulations with administrative agency. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 12.63.010 et seq.; Alaska Rules Crim.Proc., Rule 11(c)(4).

[7] Constitutional Law 197
92k197 Most Cited Cases
In analyzing the effects of a law for purpose of ex post facto analysis, relevant factors include whether, in its necessary operation, the regulatory scheme has been regarded in our history and traditions as a punishment whether it imposes an affirmative disability or restraint, whether it promotes the traditional aims of punishment, and whether it has a rational connection to a nonpunitive purpose, or is excessive with respect to this purpose. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[8] Constitutional Law 203
92k203 Most Cited Cases

[8] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Effects of Alaska's Sex Offender Registration Act (SORA) were nonpunitive, and thus, retroactive application of the Act, whose purpose was also nonpunitive, did not violate the ex post facto clause; any stigma was not integral part of Act's objective, Act imposed no physical restraint, there was no evidence of substantial occupational or housing disadvantages for registrants that would not otherwise have occurred, periodic updates were not required to be made in person, Act's purpose was not retributive, Act had legitimate nonpunitive purpose of public safety, which was reasonably advanced by alerting public, duration of reporting duty was not excessive, and notification system was passive. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 12.63.010 et seq.

[9] Constitutional Law 197
92k197 Most Cited Cases
The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[10] Constitutional Law 203
92k203 Most Cited Cases

[10] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Alaska's determination to legislate with respect to convicted sex offenders as a class in state's Sex Offender Registration Act (SORA), rather than require individual determination of their dangerousness, did not make the statute a punishment under the Ex Post Facto Clause. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 12.63.010 et seq.

****1142** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Under the Alaska Sex Offender Registration Act (Act), any sex offender or child kidnaper incarcerated in the State must register with the Department of Corrections within 30 days before his release, providing his name, address, and other specified information. If the individual is at liberty, he must register with local law enforcement authorities within a working day of his conviction or of entering the State. If he was convicted of a single, nonaggravated sex crime, the offender must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender's information is forwarded to the Department of Public Safety, which maintains a central registry of sex offenders. Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender has had medical treatment afterwards, are kept confidential. The offender's name, aliases, address, photograph, physical description, description, license and identification numbers of

motor vehicles, place of employment, date of birth, crime, date and place of conviction, length and conditions of sentence, and a statement as to whether the offender is in compliance with the Act's update requirements or cannot be located are, however, published on the Internet. Both the Act's registration and notification requirements are retroactive.

Respondents were convicted of aggravated sex offenses. Both were released from prison and completed rehabilitative programs for sex offenders. Although convicted before the Act's passage, respondents are covered by it. After the initial registration, they are required to submit quarterly verifications and notify the authorities of any changes. Both respondents, along with the wife of one of them, also a respondent here, brought this action under 42 U.S.C. § 1983, seeking to declare the Act void as to them under, *inter alia,* the *Ex Post Facto* Clause, U.S. Const., Art. I, § 10, cl. 1. The District Court granted petitioners summary judgment. The Ninth Circuit disagreed in relevant part, holding that, because its effects were punitive, the Act violates the *Ex Post Facto* Clause.

***85** *Held:* Because the Alaska Sex Offender Registration Act is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause. Pp. 1146-1154.

(a) The determinative question is whether the legislature meant to establish "civil proceedings." *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501. If the intention was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate ****1143** the State's intention to deem it civil. *E.g., ibid.* Because the Court ordinarily defers to the legislature's stated intent, *ibid.,* only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty. See, *e.g., ibid.* Pp. 1146-1147.

(b) The Alaska Legislature's intent was to create a civil, nonpunitive regime. The Court first considers the statute's text and structure, *Flemming v. Nestor,* 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435, asking whether the legislature indicated either expressly or impliedly a preference for one label or the other, *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450. Here, the statutory text states the legislature's finding that sex offenders pose a high risk of reoffending, identifies protecting the public from sex offenders as the law's primary interest, and declares that release of certain information about sex offenders to public agencies and the public will assist in protecting the public safety. This Court has already determined that an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective. *Hendricks,* 521 U.S., at 363, 117 S.Ct. 2072. Here, as in *Hendricks,* nothing on the statute's face suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm. *Id.,* at 361, 117 S.Ct. 2072. The contrary conclusion is not required by the Alaska Constitution's inclusion of the need to protect the public as one of the purposes of criminal administration. Where a legislative restriction is an incident of the State's power to protect the public health and safety, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment. *E.g., Flemming v. Nestor, supra,* at 616, 80 S.Ct. 1367, 4 L.Ed.2d 1435. Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent, see, *e.g., Hendricks,* 521 U.S., at 361, 117 S.Ct. 2072, but are open to debate in this case. The Act's notification provisions are codified in the State's Health, Safety, and Housing Code, confirming the conclusion that the statute was intended as a nonpunitive regulatory measure. Cf., *ibid.* The fact that the Act's registration provisions are codified in the State's Code of Criminal Procedure is not ***86** dispositive, since a statute's location and labels do not by themselves transform a civil remedy into a criminal one. See *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 364-365, and n. 6, 104 S.Ct. 1099, 79 L.Ed.2d 361. The Code of Criminal Procedure contains many other provisions that do not involve criminal punishment. The Court's conclusion is not altered by the fact that the Act's implementing procedural mechanisms require the trial court to inform the defendant of the Act's requirements and, if possible, the period of registration required. That conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Department of Public Safety, an agency charged with enforcing both criminal *and* civil regulatory laws. Also telling is the fact that the Act does not require the procedures adopted to

contain any safeguards associated with the criminal process. By contemplating distinctly civil procedures, the legislature indicated clearly that it intended a civil, not a criminal, sanction. *United States v. Ursery*, 518 U.S. 267, 289, 116 S.Ct. 2135, 135 L.Ed.2d 549. Pp. 1147-1149.

(c) Respondents cannot show, much less by the clearest proof, that the Act's effects negate Alaska's intention to establish a civil regulatory scheme. In analyzing the effects, the Court refers to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644, as a useful ****1144** framework. First, the regulatory scheme, in its necessary operation, has not been regarded in the Nation's history and traditions as a punishment. The fact that sex offender registration and notification statutes are of fairly recent origin suggests that the Act was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing. Respondents' argument that the Act, particularly its notification provisions, resembles shaming punishments of the colonial period is unpersuasive. In contrast to those punishments, the Act's stigma results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. The fact that Alaska posts offender information on the Internet does not alter this conclusion. Second, the Act does not subject respondents to an affirmative disability or restraint. It imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint. *Hudson*, 522 U.S., at 104, 118 S.Ct. 488. Moreover, its obligations are less harsh than the sanctions of occupational debarment, which the Court has held to be nonpunitive. See, *e.g., ibid.* Contrary to the Ninth Circuit's assertion, the record contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred. Also unavailing is that court's assertion that the periodic update requirement imposed an affirmative disability. The ***87** Act, on its face, does not require these updates to be made in person. The holding that the registration system is parallel to probation or supervised release is rejected because, in contrast to probationers and supervised releasees, offenders subject to the Act are free to move where they wish and to live and work as other citizens, with no supervision. While registrants must inform the authorities after they change their facial features, borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. Third, the Act does not promote the traditional aims of punishment. That it might deter future crimes is not dispositive. See, *e.g., id.*, at 105, 118 S.Ct. 488. Moreover, the Ninth Circuit erred in concluding that the Act's registration obligations were retributive. While the Act does differentiate between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense, these broad categories and the reporting requirement's corresponding length are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective. Fourth, the Act has a rational connection to a legitimate nonpunitive purpose, public safety, which is advanced by alerting the public to the risk of sex offenders in their community. That the Act may not be narrowly drawn to accomplish the stated purpose is not dispositive, since such imprecision does not suggest that the Act's nonpunitive purpose is a "sham or mere pretext." *Hendricks, supra*, at 371, 117 S.Ct. 2072 (KENNEDY, J., concurring). Fifth, the regulatory scheme is not excessive with respect to the Act's purpose. The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not render the Act punitive. See, *e.g., Hawker v. New York*, 170 U.S. 189, 197, 18 S.Ct. 573, 42 L.Ed. 1002. *Hendricks, supra*, at 357-368, 364, 117 S.Ct. 2072, distinguished. Moreover, the wide dissemination of offender information does not render the Act excessive, given the general mobility of the population. The question here is not whether the legislature has made the best choice possible to address the problem it seeks to remedy, but whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard. Finally, the two remaining *Mendoza-Martinez* factors-- whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already ****1145** a crime--are of little weight in this case. Pp. 1149-1154.

259 F.3d 979, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 1154. SOUTER, J., filed an opinion concurring in the judgment, *post*, p. 1154. STEVENS, J., filed a dissenting opinion, *post*, ***88** p. 1156. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 1159.

John G. Roberts, Jr., Washington, DC, for petitioners.

Theodore B. Olson, for United States as amicus curiae, by special leave of the Court, supporting the petitioners.

Darryl L. Thompson, Anchorage, AK, for respondents.

John G. Roberts, Jr., Jonathan S. Franklin, Catherine E. Stetson, Hogan & Hartson L.L.P., Washington, D.C., Cynthia M. Cooper, Anchorage, Alaska, Bruce M. Botelho, Attorney General, Patrick Gullufsen, Deputy Attorney General, Juneau, Alaska, for Petitioners.

Verne E. Rupright, Rupright & Foster, Wasilla, Alaska, for John Doe II, Darryl L. Thompson, Darryl L. Thompson, P.C., Anchorage, Alaska, Counsel for John Doe I & Jane Doe.

***89** Justice KENNEDY delivered the opinion of the Court.

The Alaska Sex Offender Registration Act requires convicted sex offenders to register with law enforcement authorities, and much of the information is made public. We must decide whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause.

I

A

The State of Alaska enacted the Alaska Sex Offender Registration Act (Act) on May 12, 1994. 1994 Alaska Sess. Laws ch. 41. Like its counterparts in other States, the Act is termed a "Megan's Law." Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, title 17, 108 Stat.2038, as amended, 42 U.S.C. § 14071, which conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets ***90** minimum standards for state programs. By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law.

The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system. Both are retroactive. 1994 Alaska Sess. Laws ch. 41, § 12(a). The Act requires any "sex offender or child kidnapper who is physically present in the state" to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Alaska Stat. § § 12.63.010(a), (b) (2000). Prompt registration is mandated. If still in prison, a covered sex offender must register within 30 days before release; otherwise he must do so within a working day of his conviction or of entering the State. § 12.63.010(a). The sex offender must provide his name, aliases, identifying ****1146** features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history. § 12.63.010(b)(1). He must permit the authorities to photograph and fingerprint him. § 12.63.010(b)(2).

If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. § § 12.63.010(d)(1), 12.63.020(a)(2). If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. § § 12.63.010(d)(2), 12.63.020(a)(1). The offender must notify his local police department if he moves. § 12.63.010(c). A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution. § § 11.56.835, 11.56.840.

The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. § 18.65.087(a). Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender has had medical treatment ***91** afterwards, are kept confidential. § § 12.63.010(b), 18.65.087(b). The following information is made available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements ... or

cannot be located." § 18.65.087(b). The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet.

B

Respondents John Doe I and John Doe II were convicted of sexual abuse of a minor, an aggravated sex offense. John Doe I pleaded *nolo contendere* after a court determination that he had sexually abused his daughter for two years, when she was between the ages of 9 and 11; John Doe II entered a *nolo contendere* plea to sexual abuse of a 14-year-old child. Both were released from prison in 1990 and completed rehabilitative programs for sex offenders. Although convicted before the passage of the Act, respondents are covered by it. After the initial registration, they are required to submit quarterly verifications and notify the authorities of any changes. Both respondents, along with respondent Jane Doe, wife of John Doe I, brought an action under Rev. Stat. § 1979, 42 U.S.C. § 1983, seeking to declare the Act void as to them under the *Ex Post Facto* Clause of Article I, § 10, cl. 1, of the Constitution and the Due Process Clause of § 1 of the Fourteenth Amendment. The United States District Court for the District of Alaska granted summary judgment for petitioners. In agreement with the District Court, the Court of Appeals for the Ninth Circuit determined the state legislature had intended the Act to be a nonpunitive, civil ***92** regulatory scheme; but, in disagreement with the District Court, it held the effects of the Act were punitive despite the legislature's intent. In consequence, it held the Act violates the *Ex Post Facto* Clause. *Doe I v. Otte*, 259 F.3d 979 (C.A.9 2001). We granted certiorari. 534 U.S. 1126, 122 S.Ct. 1062, 151 L.Ed.2d 966 (2002).

II

[1][2] This is the first time we have considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause. The framework for our inquiry, however, is well established. We must "ascertain whether the legislature meant the statute to establish '****1147** civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks, supra*, at 361, 117 S.Ct. 2072, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quoting *Ward, supra*, at 249, 100 S.Ct. 2636); see also *Hendricks, supra*, at 361, 117 S.Ct. 2072; *United States v. Ursery*, 518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

A

[3] Whether a statutory scheme is civil or criminal "is first of all a question of statutory construction." *Hendricks, supra*, at 361, 117 S.Ct. 2072 (internal quotation marks omitted); see also *Hudson, supra*, at 99, 118 S.Ct. 488. We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). A conclusion that the legislature ***93** intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it.

[4] The courts "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson, supra*, at 99, 118 S.Ct. 488 (internal quotation marks omitted). Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. 1994 Alaska Sess. Laws ch. 41, § 1. The legislature further determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Ibid.* As we observed in *Hendricks*, where we examined an *ex post facto* challenge to a postincarceration confinement of sex offenders, an imposition of restrictive measures on sex offenders adjudged to be dangerous is "a legitimate nonpunitive governmental objective and has been historically so regarded." 521 U.S., at 363, 117 S.Ct. 2072. In this case, as in *Hendricks*, "[n]othing on the face of the

statute suggests that the legislature sought to create anything other than a civil ... scheme designed to protect the public from harm." *Id.*, at 361, 117 S.Ct. 2072.

Respondents seek to cast doubt upon the nonpunitive nature of the law's declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration. Brief for Respondents 23 (citing Alaska Const., Art. I, § 12). As the Court stated in *Flemming v. Nestor*, rejecting an *ex post facto* challenge to a law terminating benefits to deported aliens, where a legislative restriction "is an incident of the State's power to protect the health and safety of its citizens," it will be considered "as evidencing an intent to exercise that ***94** regulatory power, and not a purpose to add to the punishment." 363 U.S., at 616, 80 S.Ct. 1367 (citing *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898)). The Court repeated this principle in *89 Firearms*, upholding a statute requiring ****1148** forfeiture of unlicensed firearms against a double jeopardy challenge. The Court observed that, in enacting the provision, Congress " 'was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.' " 465 U.S., at 364, 104 S.Ct. 1099 (quoting *Huddleston v. United States*, 415 U.S. 814, 824, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)). This goal was "plainly more remedial than punitive." 465 U.S., at 364, 104 S.Ct. 1099. These precedents instruct us that even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive.

[5] Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent. See *Hendricks, supra*, at 361, 117 S.Ct. 2072; *Hudson, supra*, at 103, 118 S.Ct. 488; *89 Firearms, supra*, at 363, 104 S.Ct. 1099. In this case these factors are open to debate. The notification provisions of the Act are codified in the State's "Health, Safety, and Housing Code," § 18, confirming our conclusion that the statute was intended as a nonpunitive regulatory measure. Cf. *Hendricks, supra*, at 361, 117 S.Ct. 2072 (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code" (citations omitted)). The Act's registration provisions, however, are codified in the State's criminal procedure code, and so might seem to point in the opposite direction. These factors, though, are not dispositive. The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one. In *89 Firearms*, the Court held a forfeiture provision to be a civil sanction even though the authorizing statute was in the criminal code. 465 U.S., at 364-365, 104 S.Ct. 1099. ***95** The Court rejected the argument that the placement demonstrated Congress' "intention to create an additional criminal sanction," observing that "both criminal and civil sanctions may be labeled 'penalties.' " *Id.*, at 364, n. 6, 104 S.Ct. 1099.

[6] The same rationale applies here. Title 12 of Alaska's Code of Criminal Procedure (where the Act's registration provisions are located) contains many provisions that do not involve criminal punishment, such as civil procedures for disposing of recovered and seized property, Alaska Stat. § 12.36.010 *et seq.* (2000); laws protecting the confidentiality of victims and witnesses, § 12.61.010 *et seq.*; laws governing the security and accuracy of criminal justice information, § 12.62.110 *et seq.*; laws governing civil postconviction actions, § 12.72.010 *et seq.*; and laws governing actions for writs of habeas corpus, § 12.75.010 *et seq.*, which under Alaska law are "independent civil proceeding[s]," *State v. Hannagan*, 559 P.2d 1059, 1063 (Alaska 1977). Although some of these provisions relate to criminal administration, they are not in themselves punitive. The partial codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive.

The procedural mechanisms to implement the Act do not alter our conclusion. After the Act's adoption Alaska amended its Rules of Criminal Procedure concerning the acceptance of pleas and the entering of criminal judgments. The rule on pleas now requires the court to "infor[m] the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required." Alaska Rule Crim. Proc. 11(c)(4) (2002). Similarly, the written judgments for sex offenses and child kidnapings "must set out the requirements of [the Act] and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register ****1149** for life or a lesser period." Alaska Stat. § 12.55.148(a) (2000).

The policy to alert convicted offenders to the civil

consequences of their criminal conduct does not render the consequences ***96** themselves punitive. When a State sets up a regulatory scheme, it is logical to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance. The Act requires registration either before the offender's release from confinement or within a day of his conviction (if the offender is not imprisoned). Timely and adequate notice serves to apprise individuals of their responsibilities and to ensure compliance with the regulatory scheme. Notice is important, for the scheme is enforced by criminal penalties. See § § 11.56.835, 11.56.840. Although other methods of notification may be available, it is effective to make it part of the plea colloquy or the judgment of conviction. Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.

Our conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, § § 12.63.020(b), 18.65.087(d)--an agency charged with enforcement of both criminal *and* civil regulatory laws. See, *e.g.*, § 17.30.100 (enforcement of drug laws); § 18.70.010 (fire protection); § 28.05.011 (motor vehicles and road safety); § 44.41.020 (protection of life and property). The Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process. That leads us to infer that the legislature envisioned the Act's implementation to be civil and administrative. By contemplating "distinctly civil procedures," the legislature "indicate[d] clearly that it intended a civil, not a criminal sanction." *Ursery*, 518 U.S., at 289, 116 S.Ct. 2135 (internal quotation marks omitted; alteration in original).

We conclude, as did the District Court and the Court of Appeals, that the intent of the Alaska Legislature was to create a civil, nonpunitive regime.

***97** B

[7] In analyzing the effects of the Act we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses. See *id.*, at 168-169, and nn. 22-28, 83 S.Ct. 554. Because the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S., at 249, 100 S.Ct. 2636; *89 Firearms*, 465 U.S., at 365, n. 7, 104 S.Ct. 1099, but are "useful guideposts," *Hudson*, 522 U.S., at 99, 118 S.Ct. 488. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

[8] A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such. The Court of Appeals observed that the sex offender registration and notification statutes "are of fairly recent origin," 259 F.3d, at 989, which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing. Respondents argue, ****1150** however, that the Act--and, in particular, its notification provisions--resemble shaming punishments of the colonial period. Brief for Respondents 33-34 (citing A. Earle, Curious Punishments of Bygone Days 1-2 (1896)).

Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." Hirsch, From Pillory to Penitentiary: The Rise of Criminal ***98** Incarceration in Early Massachusetts, 80 Mich. L.Rev. 1179, 1226 (1982); see also L. Friedman, Crime and Punishment in American History 38 (1993). At times the labeling would be permanent: A murderer might be branded with an "M," and a thief with a "T." R. Semmes, Crime and Punishment in Early Maryland 35 (1938); see also Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L.Rev. 1880, 1913 (1991). The aim was to make these offenders suffer "permanent stigmas, which in effect cast the person out of the community." *Ibid.*; see also Friedman, *supra*, at 40; Hirsch, *supra*, at 1228. The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one. T. Blomberg & K. Lucken, American Penology: A History of Control 30-31 (2000). Respondents contend that Alaska's compulsory registration and

notification resemble these historical punishments, for they publicize the crime, associate it with his name, and, with the most serious offenders, do so for life.

Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. See Earle, *supra,* at 20, 35-36, 51-52; Massaro, *supra,* at 1912-1924; Semmes, *supra,* at 39-40; Blomberg & Lucken, *supra,* at 30-31. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, ***99** our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath ****1151** his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

We next consider whether the Act subjects respondents to an "affirmative disability or restraint." *Mendoza-Martinez, supra,* at 168, 83 S.Ct. 554. Here, we inquire how the effects of the ***100** Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.

The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. *Hudson,* 522 U.S., at 104, 118 S.Ct. 488. The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. See *ibid.* (forbidding further participation in the banking industry); *De Veau v. Braisted,* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (forbidding work as a union official); *Hawker v. New York,* 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (revocation of a medical license). The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.

The Court of Appeals sought to distinguish *Hawker* and cases which have followed it on the grounds that the disability at issue there was specific and "narrow," confined to particular professions, whereas "the procedures employed under the Alaska statute are likely to make [respondents] *completely unemployable* " because "employers will not want to risk loss of business when the public learns that they have hired sex offenders." 259 F.3d, at 988. This is conjecture. Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force. The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by

employers and landlords. The Court of Appeals identified only one incident from the 7-year history of Alaska's law where a sex offender suffered community hostility and damage to his business after the information he submitted to the registry became public. *Id.*, at 987-988. This could have occurred in any event, because the information about the individual's conviction was already in the public domain.

***101** Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

The Court of Appeals reasoned that the requirement of periodic updates imposed an affirmative disability. In reaching this conclusion, the Court of Appeals was under a misapprehension, albeit one created by the State itself during the argument below, that the offender had to update the registry in person. *Id.*, at 984, n. 4. The State's representation was erroneous. The Alaska statute, on its face, does not require these updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act. Tr. of Oral Arg. 26-28.

****1152** The Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint imposed. 259 F.3d, at 987. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. See generally *Johnson v. United States*, 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000); *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender ***102** who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion. It suffices to say the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause.

The State concedes that the statute might deter future crimes. Respondents seize on this proposition to argue that the law is punitive, because deterrence is one purpose of punishment. Brief for Respondents 37. This proves too much. Any number of governmental programs might deter crime without imposing punishment. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' ... would severely undermine the Government's ability to engage in effective regulation." *Hudson, supra*, at 105, 118 S.Ct. 488; see also *Ursery*, 518 U.S., at 292, 116 S.Ct. 2135; *89 Firearms*, 465 U.S., at 364, 104 S.Ct. 1099.

The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because "the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." 259 F.3d, at 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. § 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

The Act's rational connection to a nonpunitive purpose is a "[m]ost significant" factor in our determination that the statute's effects are not punitive. *Ursery, supra*, at 290, 116 S.Ct. 2135. As the Court of Appeals acknowledged, the Act has a legitimate ***103** nonpunitive purpose of "public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y]." 259 F.3d, at 991. Respondents concede, in turn, that "this alternative purpose is valid, and rational." Brief for Respondents 38. They contend, however, that the Act lacks the necessary regulatory connection because it is not "narrowly drawn to accomplish the

stated purpose." *Ibid.* A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. The imprecision respondents rely upon does not suggest that the Act's nonpunitive purpose is a "sham or mere pretext." *Hendricks*, 521 U.S., at 371, 117 S.Ct. 2072 (KENNEDY, J., concurring).

In concluding the Act was excessive in relation to its regulatory purpose, the Court of Appeals relied in large part on two propositions: first, that the statute ****1153** applies to all convicted sex offenders without regard to their future dangerousness; and, second, that it places no limits on the number of persons who have access to the information. 259 F.3d, at 991-992. Neither argument is persuasive.

Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.*, at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

[9][10] The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. ***104** We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau*, 363 U.S., at 160, 80 S.Ct. 1146; *Hawker*, 170 U.S., at 197, 18 S.Ct. 573. As stated in *Hawker*: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application...." *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.

Our decision in *Hendricks*, on which respondents rely, Brief for Respondents 39, is not to the contrary. The State's objective in *Hendricks* was involuntary (and potentially indefinite) confinement of "particularly dangerous individuals." 521 U.S., at 357-358, 364, 117 S.Ct. 2072. The magnitude of the restraint made individual assessment appropriate. The Act, by contrast, imposes the more minor condition of registration. In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause.

The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997).

The Court of Appeals' reliance on the wide dissemination of the information is also unavailing. The Ninth Circuit ***105** highlighted that the information was available "world-wide" and "[b]roadcas[t]" in an indiscriminate manner. 259 F.3d, at 992. As we have explained, however, the notification system is a passive one: An individual must seek access to the information. The Web site warns that the use of displayed information "to commit a criminal act against another person is subject to criminal prosecution." http://www.dps.state.ak.us/nSorcr/asp/ (as visited Jan. 17, 2003) (available in the Clerk of Court's case file). Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment. See D. Schram & ****1154** C. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism 13 (1995) (38% of recidivist sex offenses in the State of Washington took place in jurisdictions other than where the previous offense was committed).

The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice

possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard.

The two remaining *Mendoza-Martinez* factors--whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime--are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Our examination of the Act's effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme. The Act is nonpunitive, ***106** and its retroactive application does not violate the *Ex Post Facto* Clause. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion upholding the Alaska Sex Offender Registration Act (ASORA) against *ex post facto* challenge. I write separately, however, to reiterate that "there is no place for [an implementation-based] challenge" in our *ex post facto* jurisprudence. *Seling v. Young*, 531 U.S. 250, 273, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001) (THOMAS, J., concurring in judgment). Instead, the determination whether a scheme is criminal or civil must be limited to the analysis of the obligations actually created by statute. See *id.*, at 273-274, 121 S.Ct. 727 ("[T]o the extent that the conditions result from the fact that the statute is not being applied according to its terms, the conditions are *not* the effect of the statute, but rather the effect of its improper implementation"). As we have stated, the categorization of a proceeding as civil or criminal is accomplished by examining "the statute on its face." *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (internal quotation marks omitted).

In this case, ASORA does not specify a means of making registry information available to the public. It states only that

> "[i]nformation about a sex offender ... that is contained in the central registry ... is confidential and not subject to public disclosure except as to the sex offender's ... name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a ***107** statement as to whether the offender ... is in compliance with requirements of AS 12.63 or cannot be located." Alaska Stat. § 18.65.087(b) (2000).

By considering whether Internet dissemination renders ASORA punitive, the Court has strayed from the statute. With this qualification, I concur.

Justice SOUTER, concurring in the judgment.

I agree with the Court that Alaska's Sex Offender Registration Act does not amount to an *ex post facto* law. But the majority comes to that conclusion by a different ****1155** path from mine, and I concur only in the judgment.

As the Court says, our cases have adopted a two-step enquiry to see whether a law is punitive for purposes of various constitutional provisions including the *Ex Post Facto* Clause. At the first step in applying the so-called *Kennedy-Ward* test, we ask whether the legislature intended a civil or criminal consequence; at the second, we look behind the legislature's preferred classification to the law's substance, focusing on its purpose and effects. See *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980); *Kennedy v. Mendoza--Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). We have said that " 'only the clearest proof ' " that a law is punitive based on substantial factors will be able to overcome the legislative categorization. *Ward, supra*, at 249, 100 S.Ct. 2636 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)). I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction. See *Hudson v. United States*, 522 U.S. 93, 113-114, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (SOUTER, J., concurring in judgment). This means that for me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil

characterization of the Act, but also see considerable evidence pointing the other way.

The Act does not expressly designate the requirements imposed as "civil," a fact that itself makes this different from ***108** our past cases, which have relied heavily on the legislature's stated label in finding a civil intent. See *Hudson, supra,* at 103, 118 S.Ct. 488; *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *Allen v. Illinois,* 478 U.S. 364, 368, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986). The placement of the Act in the State's code, another important indicator, see *Hendricks, supra,* at 361, 117 S.Ct. 2072, also leaves matters in the air, for although the section establishing the registry is among the code's health and safety provisions, which are civil, see Alaska Stat. § 18.65.087 (2000), the section requiring registration occurs in the title governing criminal procedure, see § 12.63.010. What is more, the legislature made written notification of the requirement a necessary condition of any guilty plea, see Alaska Rule Crim. Proc. 11(c)(4) (2002), and, perhaps most significant, it mandated a statement of the requirement as an element of the actual judgment of conviction for covered sex offenses, see Alaska Stat. § 12.55.148 (2000); Alaska Rule Crim. Proc. 32(c) (2002). Finally, looking to enforcement, see *Hudson, supra,* at 103, 118 S.Ct. 488, offenders are obliged, at least initially, to register with state and local police, see § § 12.63.010(b), (c), although the actual information so obtained is kept by the State's Department of Public Safety, a regulatory agency, see § 18.65.087(a). These formal facts do not force a criminal characterization, but they stand in the way of asserting that the statute's intended character is clearly civil.

The substantial indicators relevant at step two of the *Kennedy-Ward* analysis likewise point in different directions. To start with purpose, the Act's legislative history shows it was designed to prevent repeat sex offenses and to aid the investigation of reported offenses. See 1994 Alaska Sess. Laws ch. 41, § 1; Brief for Petitioners 26, n. 13. Ensuring public safety is, of course, a fundamental regulatory goal, see, *e.g., United States v. Salerno,* 481 U.S. 739, 747, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), and this objective should be given serious weight in the analyses. But, at the same time, it would be naive to look no ***109** further, given pervasive attitudes toward sex offenders, see *infra,* at 1156, n. See *Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) *(Ex Post Facto* Clause was meant to prevent "arbitrary and potentially vindictive legislation"). The fact that the Act uses past crime as the touchstone, probably ****1156** sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. See *Kennedy, supra,* at 169, 83 S.Ct. 554.

That argument can claim support, too, from the severity of the burdens imposed. Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community. See, *e.g.,* Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L.Rev. 1880, 1913 (1991). While the Court accepts the State's explanation that the Act simply makes public information available in a new way, *ante,* at 1150-1151, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm. [FN*]

> FN* I seriously doubt that the Act's requirements are "less harsh than the sanctions of occupational debarment" that we upheld in *Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), *De Veau v. Braisted,* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), and *Hawker v. New York,* 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898). See *ante,* at 1151. It is true that the Act imposes no formal proscription against any particular employment, but there is significant evidence of onerous practical effects of being listed on a sex offender registry. See, *e.g., Doe v. Pataki,* 120 F.3d 1263, 1279 (C.A.2 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification--ranging from public shunning, picketing, press vigils,

> ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (C.A.3 1997) ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them"); Brief for Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7-21 (describing specific incidents).

***110** To me, the indications of punitive character stated above and the civil indications weighed heavily by the Court are in rough equipoise. Certainly the formal evidence of legislative intent does not justify requiring the " 'clearest proof ' " of penal substance in this case, see *Hudson*, 522 U.S., at 113-114, 118 S.Ct. 488 (SOUTER, J., concurring in judgment), and the substantial evidence does not affirmatively show with any clarity that the Act is valid. What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court's judgment.

Justice STEVENS, dissenting in No. 01-729 and concurring in the judgment in No. 01-1231. [FN*]

> FN* [This opinion applies also to No. 01-1231, *Connecticut Dept. of Public Safety v. Doe, post*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).]

These two cases raise questions about statutes that impose affirmative obligations on convicted sex offenders. The question in No. 01-729 is whether the Alaska Sex Offender Registration Act is an ****1157** *ex post facto* law, and in No. 01-1231 ***111** it is whether Connecticut's similar law violates the Due Process Clause.

The Court's opinions in both cases fail to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty. If no liberty interest were implicated, it seems clear that neither statute would raise a colorable constitutional claim. Cf. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Proper analysis of both cases should therefore begin with a consideration of the impact of the statutes on the registrants' freedom.

The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information--including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment--at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page.

The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. And there can be no doubt that the "[w]idespread public access," *ante*, at 1150 (opinion in No. 01-***112** 729), to this personal and constantly updated information has a severe stigmatizing effect. See Brief for the Office of the Public Defender for the State of New Jersey et al. as *Amici Curiae* 7-21 (providing examples of threats, assaults, loss of housing, and loss of jobs experienced by sex offenders after their registration information was made widely available). In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty. Cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a *sufficient* and a *necessary* condition for the sanction.

To be sure, there are cases in which we have held that it was not punishment and thus not a violation of the *Ex Post Facto* Clause to deny future privileges to individuals who were convicted of crimes. See, *e.g.*, *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (upholding prohibition of convicted felons from working for waterfront unions); *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (upholding prohibition of doctors who had been convicted of a felony from practicing medicine). Those cases are distinguishable because in each the prior conviction was a sufficient condition for the imposition of the burden, but it was not a necessary one. That is, one may be barred from participation in a union because he has not paid fines imposed on ****1158** him. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-192, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967). And a doctor may not be permitted to practice medicine because she is no longer competent to do so. See, *e.g.*, N.J. Stat. Ann. § 45:1-21 (West Supp.2002).

***113** Likewise, in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the Court held that a law that permitted the civil commitment of persons who had committed or had been charged with a sexually violent offense was not an *ex post facto* law. But the fact that someone had been convicted was not sufficient to authorize civil commitment under Kansas law because Kansas required another proceeding to determine if such a person suffered from a " 'mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.' " *Id.*, at 352, 117 S.Ct. 2072. Nor was the conviction even a necessary predicate for the commitment. See *ibid.* (Kansas' civil commitment procedures also applied to individuals charged with a sexually violent offense but found incompetent to stand for trial, or found not guilty by reason of insanity or by reason of mental disease or defect). While one might disagree in other respects with *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by that statute.

No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. As the Court recognizes, "recidivism is the statutory concern" that provides the supposed justification for the imposition of such retroactive punishment. *Ante*, at 1154 (opinion in No. 01-729). That is the principal rationale that underlies the "three strikes" statute that the Court has upheld ***114** in *Ewing v. California*, *post*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Reliance on that rationale here highlights the conclusion that the retroactive application of these statutes constitutes a flagrant violation of the protections afforded by the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution.

I think it equally clear, however, that the State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants. Looking to the future, these aspects of their punishment are adequately justified by two of the traditional aims of punishment--retribution and deterrence. Moreover, as a matter of procedural fairness, Alaska requires its judges to include notice of the registration requirements in judgments imposing sentences on convicted sex offenders and in the colloquy preceding the acceptance of a plea of guilty to such an offense. See Alaska Rules Crim. Proc. 11(c)(4) and 32(c) (2002). Thus, I agree with the Court that these statutes are constitutional as applied to postenactment offenses.

Accordingly, I would hold that the Alaska statute violates the constitutional prohibition on *ex post facto* laws. Because I believe registration and publication

are a permissible component of the punishment for this category of crimes, however, for those convicted of offenses committed after the effective date of such legislation, there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial. ****1159** I therefore concur in the Court's disposition of the Connecticut case, No. 01-1231, and I respectfully dissent from its disposition of the Alaska case, No. 01-729.

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

As Justice SOUTER carefully explains, it is unclear whether the Alaska Legislature conceived of the State's Sex Offender Registration Act as a regulatory measure or as a ***115** penal law. See *ante,* at 1154-1156 (opinion concurring in judgment). Accordingly, in resolving whether the Act ranks as penal for *ex post facto* purposes, I would not demand "the clearest proof" that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), I would neutrally evaluate the Act's purpose and effects. See *id.,* at 168-169, 83 S.Ct. 554 (listing seven factors courts should consider "[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute"); cf. *Hudson v. United States,* 522 U.S. 93, 115, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (BREYER, J., concurring in judgment) ("[I]n fact if not in theory, the Court has simply applied factors of the *Kennedy* variety to the matter at hand."). [FN1]

> FN1. The *Mendoza-Martinez* factors include "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative [nonpunitive] purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." 372 U.S., at 168-169, 83 S.Ct. 554.

Measured by the *Mendoza-Martinez* factors, I would hold Alaska's Act punitive in effect. Beyond doubt, the Act involves an "affirmative disability or restraint." 372 U.S., at 168, 83 S.Ct. 554. As Justice STEVENS and Justice SOUTER spell out, Alaska's Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism. See *ante,* at 1156, and n. (SOUTER, J., concurring in judgment); *ante,* at 1157 (STEVENS, J., dissenting in No. 01-729 and concurring in judgment in No. 01-1231).

Furthermore, the Act's requirements resemble historically common forms of punishment. See *Mendoza-Martinez,* 372 U.S., at 168, 83 S.Ct. 554. Its registration and reporting provisions are comparable to conditions of supervised release or parole; its ***116** public notification regimen, which permits placement of the registrant's face on a webpage under the label "Registered Sex Offender," calls to mind shaming punishments once used to mark an offender as someone to be shunned. See *ante,* at 1157 (STEVENS, J., dissenting in No. 01-729 and concurring in judgment in No. 01-1231); *ante,* at 1156 (SOUTER, J., concurring in judgment).

Telling too, as Justice SOUTER observes, past crime alone, not current dangerousness, is the "touchstone" triggering the Act's obligations. *Ante,* at 1155 (opinion concurring in judgment); see *ante,* at 1157-1158 (STEVENS, J., dissenting in No. 01-729 and concurring in judgment in No. 01-1231). This touchstone adds to the impression that the Act retributively targets past guilt, *i.e.,* that it "revisit[s] past crimes [more than it] prevent[s] future ones." *Ante,* at 1156 (SOUTER, J., concurring in judgment); see *Mendoza-Martinez,* 372 U.S., at 168, 83 S.Ct. 554.

Tending the other way, I acknowledge, the Court has ranked some laws civil and nonpunitive although they impose significant disabilities or restraints. See, *e.g., Flemming v. Nestor,* 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960) (termination of accrued disability benefits payable to deported resident aliens); ****1160***Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (civil confinement of mentally ill sex offenders). The Court has also deemed some laws nonpunitive despite "punitive aspects." See *United States v. Ursery,* 518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose.

See *Mendoza-Martinez*, 372 U.S., at 169, 83 S.Ct. 554. As respondents concede, see Brief for Respondents 38, the Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. See *ante*, at 1152 (majority opinion). But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not ***117** to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. See *ante*, at 1146. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. [FN2] However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

> FN2. For the reasons stated by Justice SOUTER, see *ante*, at 1156, n. (opinion concurring in judgment), I do not find the Court's citations to *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), and *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), see *ante*, at 1152-1153 (majority opinion), convincingly responsive to this point.

John Doe I, for example, pleaded *nolo contendere* to a charge of sexual abuse of a minor nine years before the Alaska Act was enacted. He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program's requirements and his apparent low risk of reoffense. Brief for Respondents 1. He subsequently remarried, established a business, and was reunited with his family. *Ibid.* He was also granted custody of a minor daughter, based on a court's determination that he had been successfully rehabilitated. See *Doe I v. Otte*, 259 F.3d 979, 983 (C.A.9 2001). The court's determination rested in part on psychiatric evaluations concluding that Doe had "a very low risk of re-offending" and is "not a pedophile." *Ibid.* (internal quotation marks omitted). Notwithstanding this strong evidence of rehabilitation, the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly ***118** to label him a "Registered Sex Offender" for the rest of his life.

Satisfied that the Act is ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the *Ex Post Facto* Clause, and would therefore affirm the judgment of the Court of Appeals.

538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164, 71 USLW 4125, 71 USLW 4182, 03 Cal. Daily Op. Serv. 1974, 2003 Daily Journal D.A.R. 2474, 16 Fla. L. Weekly Fed. S 142

Briefs and Other Related Documents **(Back to top)**

- 2002 WL 31599645, 71 USLW 3366 (Oral Argument) Oral Argument (Nov. 13, 2002)
- 2002 WL 31016526 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Sep. 04, 2002)
- 2002 WL 1822142 (Appellate Brief) BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ALASKA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Aug. 05, 2002)
- 2002 WL 1822146 (Appellate Brief) BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF DOE I, ET AL., Respondents (Aug. 05, 2002)
- 2002 WL 1836721 (Appellate Brief) BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Aug. 05, 2002)
- 2002 WL 1885873 (Appellate Brief) BRIEF FOR RESPONDENTS (Aug. 05, 2002)
- 2002 WL 31016516 (Appellate Brief) AMICUS CURIAE BRIEF SUPPORTING RESPONDENTS IN EVIDENCE THAT INTERNET SEX OFFENDER REGISTRATION IS EXCESSIVE PUNISHMENT THAT STATISTICALLY REDUCES PUBLIC SAFETY (Aug. 05, 2002)
- 2002 WL 1798874 (Appellate Brief) BRIEF OF THE MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES AS AMICUS

CURIAE IN SUPPORT OF RESPONDENTS (Aug. 01, 2002)

• 2002 WL 1798881 (Appellate Brief) BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY, THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Jul. 31, 2002)

• 2002 WL 1269682 (Appellate Brief) BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE SUPPORTING PETITIO NERS (Jun. 03, 2002)

• 2002 WL 1269892 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae, and Brief Amicus Curiae of The Reporters Committee for Freedom of the Press, in Support of Petitioners (Jun. 03, 2002)

• 2002 WL 1275055 (Appellate Brief) BRIEF FOR PETITIONERS (Jun. 03, 2002)

• 2002 WL 1308581 (Appellate Brief) Brief of the State of California Ex Rel. Bill Lockyer, Attorney General, And the State of Colorado Ex Rel. Ken Salazar, Attorney General, And the 41 States and Territories of Alabama, Arizona, Connecticut, Delaware, The District of Columbia As Amici Curiae in Support of Petitioner, The State of Alaska Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New Jersey, New (May. 30, 2002)

• 01-729 (Docket) (Nov. 28, 2001)

END OF DOCUMENT

C

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fifth Circuit Rule 47.5.4. (FIND CTA5 Rule 47.)

United States Court of Appeals,
Fifth Circuit.
Dionicio A. CRUZ, Petitioner-Appellant,
v.
TEXAS PAROLE DIVISION, Respondent-Appellee.
No. 03-50745
Summary Calendar.

Jan. 30, 2004.

Background: State parolee filed petition for federal habeas relief, challenging **constitutionality** of retroactive application of state's new supervision law. The United States District Court for the Western District of Texas denied petition. Parolee appealed.

Holding: The Court of Appeals held that: retroactive application of state's new parole laws did not violate Ex Post Facto Clause.
Affirmed.

West Headnotes

[1] **Pardon and Parole** 46
284k46 Most Cited Cases
Texas prisoners have no constitutional expectancy of parole.

[2] **Constitutional Law** 203
92k203 Most Cited Cases

[2] **Pardon and Parole** 42.1
284k42.1 Most Cited Cases
Retroactive application of state's new parole laws, imposing **electronic monitoring,** urinalysis, driving restrictions, and curfew, did not violate Ex Post Facto Clause. U.S.C.A. Const. Art. 1, § 9, cl. 3.
***346** Appeal from the United States District Court for the Western District of Texas. USDC No. SA-02-CV-310.

Dionicio A. Cruz, San Austin, TX, Pro se.

Ellen Stewart-Klein, Austin, TX, for Respondent-Appellee.

Before JOLLY, WIENER, and DENNIS, Circuit Judges.

PER CURIAM: [FN*]

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Dionicio A. Cruz, a Texas parolee, appeals the district court's denial of his 28 U.S.C. § 2254 petition, wherein he challenged the retroactive application of the State of Texas' Super Intensive Supervision Program ("SISP") as a condition of his parole. The district court granted Cruz a certificate of appealability on the issue whether SISP violates the Ex Post Facto Clause by subjecting Cruz to greater punishment on parole.

Cruz argues that: (1) he is entitled to the benefit of the parole laws in effect at the time of his conviction and subsequent parole violation and (2) the retroactive application of SISP constitutes a violation of the Ex Post Facto Clause because the SISP provisions are more onerous than the former parole laws. He has also filed a motion for injunctive relief in this court.

***347** [1] Texas prisoners have no constitutional expectancy of parole. *See Madison v. Parker,* 104 F.3d 765, 768 (5th Cir.1997). Thus, to the extent Cruz argues that he is entitled to the benefit of the parole laws that were in effect at the time of his state conviction and subsequent parole violation, he has not stated a violation of a constitutional right. *See Orellana v. Kyle,* 65 F.3d 29, 32 (5th Cir.1995).

[2] To the extent that Cruz argues that SISP violates the Ex Post Facto Clause by increasing the punishment for his offense, his argument fails. The only SISP condition that Cruz specifically challenges on appeal is the State's use of **electronic monitoring.**

In *Vineyard v. Keesee*, No. 95-10132, 70 F.3d 1266 (5th Cir. Oct.18, 1995) (unpublished), slip. op. at 3-5, this court held that changes in Texas parole laws imposing **electronic monitoring,** urinalysis, driving restrictions, and curfew did not constitute an *ex post facto* violation. In light of *Vineyard,* Cruz has not stated a violation of a constitutional right. *See* 5TH CIR. R. 47.5.3. Because Cruz has failed to establish a violation of his constitutional rights, he is not entitled to habeas relief. *See Orellana*, 65 F.3d at 31.

In his request for injunctive relief, Cruz seeks to enjoin the State from impeding his access to the law library. In light of the disposition of this case, Cruz cannot make the showing required for obtaining an injunction because he cannot demonstrate a substantial likelihood of success on the merits. *See Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir.1987).

AFFIRMED; MOTION DENIED.

87 Fed.Appx. 346

Briefs and Other Related Documents (Back to top)

• 2003 WL 23515575 (Appellate Brief) Reply Brief of Petitioner-Appellant (Nov. 17, 2003)

• 2003 WL 23515576 (Appellate Brief) Respondent's Brief (Nov. 03, 2003)

• 2003 WL 23515574 (Appellate Brief) Appellant's Brief (Sep. 24, 2003)

• 03-50745 (Docket) (Jul. 08, 2003)

END OF DOCUMENT

H

Briefs and Other Related Documents

United States Court of Appeals,
Eighth Circuit.
John DOE, I, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, II, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, III, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa, Appellees,
v.
Tom MILLER, Iowa Attorney General; Appellant.
J. Patrick White, as representatives of the class of all county attorneys in Iowa; Michael Wolf, as representatives of the class of all county attorneys in Iowa, Defendants.
No. 04-1568.

Submitted: Nov. 4, 2004.
Filed: April 29, 2005.
Rehearing and Rehearing En Banc Denied June 30, 2005. [FN*]

FN* Judge Morris Sheppard Arnold, Judge Murphy, Judge Bye, Judge Melloy, and Judge Smith would grant the petition for rehearing en banc.

Background: Sex offenders brought class action challenging constitutionality of Iowa statute that prohibited person who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility. The United States District Court for the Southern District of Iowa, Robert W. Pratt, J., granted judgment for sex offenders, 298 F.Supp.2d 844. State appealed.

Holdings: The Court of Appeals, Colloton, Circuit Judge, held that:
(1) statute did not violate due process clause of Fourteenth Amendment on its face for lack of notice;
(2) statute did not foreclose opportunity to be heard;
(3) statute did not contravene principles of procedural due process;
(4) statute did not infringe upon constitutional liberty interest relating to matters of marriage and family in fashion that required heightened scrutiny;
(5) statute did not interfere with constitutional right to travel;
(6) statute did not implicate alleged right to intrastate travel;
(7) prohibition was rational way of promoting safety of children; and
(8) statute was not retroactive criminal punishment in violation of ex post facto clause.
Reversed and remanded.

Melloy, Circuit Judge, filed opinion concurring and dissenting.

West Headnotes

[1] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[1] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not violate due process clause of Fourteenth Amendment on its face for lack of notice, although some cities were unable to provide sex offenders with information about location of all schools and registered child care facilities and it was difficult to measure restricted areas, which were measured "as the crow flies" from school or child care facility. U.S.C.A. Const.Amend 14; I.C.A. § 692A.2A.

[2] Constitutional Law 258(2)
92k258(2) Most Cited Cases
The judicial doctrine of vagueness under the due process clause requires that a criminal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend 14.

[3] Criminal Law 13.1(1)
110k13.1(1) Most Cited Cases
A criminal statute is not vague on its face unless it is impermissibly vague in all of its applications; the

possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute. U.S.C.A. Const.Amend 14.

[4] Constitutional Law 257.5
92k257.5 Most Cited Cases
Entrapment.
Due process does not require that independently elected county attorneys enforce each criminal statute with equal vigor, and the existence of different priorities or prosecution decisions among jurisdictions does not violate the Constitution. U.S.C.A. Const.Amend 14.

[5] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[5] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not foreclose opportunity to be heard under due process clause of Fourteenth Amendment, although statute did not provide process for individual determinations of dangerousness; due process did not entitle any person legislatively classified as sex offender to hearing to establish fact that was not material under the state statute. U.S.C.A. Const.Amend 14; I.C.A. § 692A.2A.

[6] Constitutional Law 255(5)
92k255(5) Most Cited Cases
States are not barred by principles of procedural due process from drawing classifications among sex offenders and other individuals. U.S.C.A. Const.Amend 14.

[7] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[7] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not contravene principles of procedural due process under Fourteenth Amendment, since restriction applied to all offenders who had been
convicted of certain crimes against minors, regardless of what estimates of future dangerousness might have been proved in individualized hearings. U.S.C.A. Const.Amend 14; I.C.A. § 692A.2A.

[8] Constitutional Law 255(5)
92k255(5) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not infringe upon constitutional liberty interest relating to matters of marriage and family in fashion that required heightened scrutiny; although statute restricted location of sex offender's residence, statute did not directly regulate family relationship or prevent any family member from residing with sex offender in residence in manner consistent with statute. U.S.C.A. Const.Amend 14; I.C.A. § 692A.2A.

[9] Constitutional Law 252.5
92k252.5 Most Cited Cases
Substantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires a court to exercise the utmost care whenever it is asked to break new ground in that field. U.S.C.A. Const.Amend 14.

[10] Constitutional Law 206(1)
92k206(1) Most Cited Cases

[10] Constitutional Law 207(1)
92k207(1) Most Cited Cases

[10] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[10] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not interfere with right of sex offenders to travel under substantive due process, Privileges and Immunities Clause of Article IV and Privileges or Immunities Clause of Fourteenth Amendment, since statute did not impose any obstacle to sex offender's entry into Iowa, it did not erect actual barrier to interstate movement, and it did not treat nonresidents who visited Iowa any differently than current residents or discriminate against citizens of other states who wished to establish residence in Iowa. U.S.C.A. Const. Art. 4, § 2, cl. 2; U.S.C.A. Const.Amend 14; I.C.A. § 692A.2A.

[11] Constitutional Law 83(6)
92k83(6) Most Cited Cases

[11] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not implicate alleged right to intrastate travel, since statute did not prevent sex offender from entering or leaving any part of state, including areas within 2000 feet of a school or child care facility, and it did not erect any actual barrier to intrastate movement. I.C.A. § 692A.2A.

[12] Constitutional Law 83(1)
92k83(1) Most Cited Cases

[12] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Sex offenders, who were subject to Iowa statute that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not show that United States Constitution established right to "live where you want" that would have required strict scrutiny of state's residency restrictions, where sex offenders did not develop any argument that right to "live where you want" was deeply rooted in nation's history and tradition or that "living where you want" was implicit in concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. I.C.A. § 692A.2A.

[13] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, was rational way of promoting safety of children; although no scientific study supported legislature's conclusion that excluding sex offenders from residing within 2000 feet of school or child care facility was likely to enhance safety of children, state legislature had authority to make judgments about best means to protect health and welfare of its citizens in area where precise statistical data was unavailable and human behavior was necessarily unpredictable. I.C.A. § 692A.2A.

[14] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, rationally advanced legitimate governmental purpose of promoting safety of children, since convicted sex offenders had distinguishing characteristics relevant to interests that state had authority to implement, Iowa General Assembly and Governor did not act based merely on negative attitudes toward, fear of, or bare desire to harm politically unpopular group, and policymakers of Iowa were institutionally equipped to set such parameters and were entitled to employ "common sense." I.C.A. § 692A.2A.

[15] Criminal Law 393(1)
110k393(1) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, did not violate right against self-incrimination under Fifth Amendment, since statute did not require any offender to provide any information that might have been used in criminal case; although separate section of Iowa Code required sex offender to register his address with county sheriff, offenders did not challenge constitutionality of registration requirement or seek injunction against its enforcement. U.S.C.A. Const.Amends. 5, 14; I.C.A. § 692A.2A.

[16] Constitutional Law 203
92k203 Most Cited Cases

[16] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Iowa statute, that prohibited persons who had committed criminal sex offense against minor from residing within two thousand feet of school or child care facility, was not retroactive criminal punishment in violation of ex post facto clause, since statute was designed to be nonpunitive and regulatory, and sex offenders could not establish by "clearest proof" that Iowa's choice was excessive in relation to its legitimate regulatory purpose given challenge in determining precisely what distance was best suited to minimize risk to children without unnecessarily restricting sex offenders and difficult policy judgments inherent in that choice. U.S.C.A. Const. Art. 1, § 10, cl. 1; I.C.A. § 692A.2A.

[17] Constitutional Law 203
92k203 Most Cited Cases
States are prohibited by the ex post facto clause from enacting laws that increase punishment for criminal acts after they have been committed. U.S.C.A. Const.

Art. 1, § 10, cl. 1.

[18] Constitutional Law 197
92k197 Most Cited Cases
When determining whether a state statute violates the Ex Post Facto Clause, a law is necessarily punitive if the legislature intended criminal punishment; however, if the legislature intended its law to be civil and non-punitive, only the clearest proof that the law is nonetheless so punitive either in purpose or effect as to negate the state's nonpunitive intent will transform a civil regulatory measure into a criminal penalty. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[19] Constitutional Law 197
92k197 Most Cited Cases
On an Ex Post Facto Clause claim, where a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[20] Constitutional Law 197
92k197 Most Cited Cases
Whether the regulatory scheme has a rational connection to a nonpunitive purpose is the most significant factor in the ex post facto analysis; a statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[21] Constitutional Law 197
92k197 Most Cited Cases
The Ex Post Facto Clause does not preclude a state from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences, and, therefore, the absence of a particularized risk assessment does not necessarily convert a regulatory law into a punitive measure. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[22] Constitutional Law 197
92k197 Most Cited Cases
The excessiveness inquiry of ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy, but rather an inquiry into whether the regulatory means chosen are reasonable in light of the nonpunitive objective. U.S.C.A. Const. Art. 1, § 10, cl. 1.

West Codenotes

Negative Treatment Reconsidered

I.C.A. § 692A.2A.

***704** Gordon Eugene Allen, argued, Des Moines, IA (Thomas J. Miller, on the brief), for appellant.

Philip B. Mears, argued, Iowa City, IA (Randall Wilson, on the brief), for appellee.

Before RILEY, MELLOY, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

In 2002, in an effort to protect children in Iowa from the risk that convicted sex offenders may reoffend in locations close to their residences, the Iowa General Assembly passed, and the Governor of Iowa signed, a bill that prohibits a person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or a registered child care facility. The district court declared the statute unconstitutional on several grounds and enjoined the Attorney General of Iowa and the ninety-nine county attorneys in Iowa from enforcing the prohibition.

Because we conclude that the Constitution of the United States does not prevent the State of Iowa from regulating the residency ***705** of sex offenders in this manner in order to protect the health and safety of the citizens of Iowa, we reverse the judgment of the district court. We hold unanimously that the residency restriction is not unconstitutional on its face. A majority of the panel further concludes that the statute does not amount to unconstitutional *ex post facto* punishment of persons who committed offenses prior to July 1, 2002, because the appellees have not established by the "clearest proof," as required by Supreme Court precedent, that the punitive effect of the statute overrides the General Assembly's legitimate intent to enact a nonpunitive, civil regulatory measure that protects health and safety.

I.

Iowa Senate File 2197, now codified at Iowa Code § 692A.2A, took effect on July 1, 2002. It provides that persons who have been convicted of certain criminal offenses against a minor, including numerous sexual offenses involving a minor, shall not reside within 2000 feet of a school or registered child care facility. Iowa Code § 692A.2A(1)-(2). The law does not apply to persons who established a residence prior to July 1, 2002, or to schools or child

care facilities that are newly located after July 1, 2002. *Id.* § 692A.2A(4)(c). Violations of the statute are punishable as aggravated misdemeanors. Iowa Code § 692A.2A(3). [FN1]

> FN1. The text of the statute provides as follows:
> 692A.2A Residency restrictions--child care facilities and schools.
> 1. For purposes of this section, "person" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor. 2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
> 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
> 4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
> a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
> b. The person is subject to an order of commitment under chapter 229A.
> c. The person has established a residence prior to [ ] July 1, 2002, or a school or child care facility is newly located on or [after] July 1, 2002.
> d. The person is a minor or a ward under a guardianship.
> Iowa Code § 692A.2A. The term "residence" is defined as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory." Iowa Code § 692A.1(8).

Almost immediately after the law took effect, three named plaintiffs--sex offenders with convictions that predate the law's effective date--filed suit asserting that the statute is unconstitutional on its face. The district court certified their action as a class action, with a plaintiff class that includes all individuals to whom Iowa Code § 692A.2A applies who are currently living in Iowa or who wish to move to Iowa, except for any person who currently is the subject of a prosecution under § 692A.2A. The named plaintiffs, identified as various "John Does," had committed a range of sexual crimes, including indecent exposure, "indecent liberties with a child," sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse, all of which brought them within the provisions of the residency restriction. A defendant class, including all ***706** of Iowa's county attorneys, also was certified.

During a two-day bench trial, plaintiffs presented evidence concerning the enforcement of § 692A.2A, including maps that had been produced by several cities and counties identifying schools and child care facilities and their corresponding restricted areas. After viewing these maps and hearing testimony from a county attorney, the district court found that the restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence. In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders. The court found that unincorporated areas, small towns with no school or child care facility, and rural areas remained unrestricted, but that available housing in these areas is "not necessarily readily available." *Doe v. Miller*, 298 F.Supp.2d 844, 851 (S.D.Iowa 2004). [FN2]

> FN2. The parties presented substantial evidence concerning the effect of the statute on the availability of housing for sex offenders in Carroll County, Iowa. The district court found that 2077 of 9019 residential units in the county (23 percent) were not in restricted areas. The Carroll County Attorney testified that 1694 of the available units were in unincorporated areas of the county, and were "mainly farmhouses," but he noted that the trend toward larger farms has created some vacancies in farmhouses where the party farming the land does not live in the farmhouse. Of the remaining 383 units available in the county, the district court found that 244 were located in towns without a school or child care facility. *Doe v. Miller*, 298 F.Supp.2d at 852.

Plaintiffs also presented evidence of their individual experiences in seeking to obtain housing that complies with the 2000-foot restriction. Several of the plaintiffs, including John Does III, IV, XV, and

XVIII, have friends or relatives with whom they would like to live, but whose homes are within 2000 feet of a school or child care facility. Many, such as John Does VII, X, XI, XII, XIII, XIV, and XVIII, live in homes that are currently compliant, either because they were established prior to July 1, 2002, or because the homes are outside the 2000-foot restricted areas. These plaintiffs, however, testified that they would like to be able to move into a restricted area. Still others, John Does II, VI, VIII, IX, XV, and XVI, are living in non-compliant residences that they wish to maintain.

Plaintiffs testified that in many cases they had a difficult time obtaining housing that was not within 2000 feet of a school or child care center. John Doe VII testified that he investigated 40 residences, but was unable to find any housing that would not place him in violation of § 692A.2A. The evidence also showed, however, that while the residency restriction may have exacerbated a housing problem for the plaintiffs, not all of their difficulty was caused by the statute. For example, John Doe II had difficulty finding housing in part because of his credit problems. John Doe XIV testified that the only available compliant housing in his hometown, Waterloo, was too expensive, so he and his wife purchased a rural home about 45 miles away. The mother of John Doe IV made efforts to help her son find housing, and she testified that she was able to find two potential residences for her son, but neither residence had any vacant units. John Doe VI was renting an apartment in compliance with § 692A.2A, but had to move out when the landlord decided that he did not want to rent to a sex offender. Similarly, John Does VIII and XI each found at least one possible compliant apartment, but their applications were denied because of their ***707** criminal records. In apparent contrast to this testimony from the plaintiffs, Dudley Allison, a parole and probation officer, testified that while the statute made it more difficult for sex offenders to find housing, "virtually everyone" among the covered parolees and probationers whom he supervised between July 2002 and July 2003 was able to locate housing in compliance with the statute. (T. Tr. at 285).

In addition to evidence regarding the burden that § 692A.2A places on sex offenders, both plaintiffs and defendants presented expert testimony about the potential effectiveness of a residency restriction in preventing offenses against minors. The State presented the testimony of Mr. Allison, a parole and probation officer who specialized in sex offender supervision. Allison described the process of treating sex offenders and his efforts at preventing recidivism by identifying the triggers for the original offense, and then imposing restrictions on the residences or activities of the offender. According to Allison, restrictions on the proximity of sex offenders to schools or other facilities that might create temptation to reoffend are one way to minimize the risk of recidivism. In the parole and probation context, Allison also has authority to limit offenders' activities in more specific ways, and he testified that he attempts to remove temptation by preventing offenders from working in jobs where they would have contact with potential victims or from living near parks or other areas where children might spend time unsupervised. In addition to the limits that he imposes on offenders under his supervision, Allison also testified that there is "a legitimate public safety concern" in where unsupervised sex offenders reside. In Allison's view, reoffense is "a potential danger forever."

The State also introduced the transcript of hearing testimony by Dr. William McEchron, a psychologist with a general practice that includes sex offender patients. Like Allison, Dr. McEchron testified that there is no cure for sex offenders and that "there are never any guarantees that they might not reoffend." In his view, the "biggest risk is what's going on inside the individual," but reducing the opportunity and the temptation to reoffend is extremely important to treatment. He explained that because there are "very high rates of re-offense for sex offenders who had offended against children," he believed it would be appropriate to restrict places where sex offenders might come into contact with children. He thought the appropriateness of such a restriction was "common sense," although he said there were insufficient data to know "where to draw the marks." Dr. McEchron also testified, however, that in his view, life-long restrictions like § 692A.2A do not aid in the treatment process, and could even foster negative attitudes toward authority and depression in offenders who view the law as unfair.

The plaintiffs offered the testimony of Dr. Luis Rosell, a psychologist with experience in sex offender treatment. Dr. Rosell estimated that the recidivism rate for sex offenders is between 20 and 25 percent, and like Allison and Dr. McEchron, stated his belief that the key to reducing the risk of recidivism is identifying the factors that led to the offender's original offense and then helping the offender to deal with or avoid those factors in the future. Dr. Rosell testified that reducing a specific sex offender's access to children was a good idea, and

that "if you remove the opportunity, then the likelihood of reoffense is decreased." He did not believe, however, that "residential proximity makes that big of a difference." Moreover, Dr. Rosell thought that a 2000-foot limit was "extreme." Like Dr. McEchron, he worried that the law might be counterproductive ***708** to the offender's treatment goals by causing depression and potentially removing the offender from his "support system."

After hearing the testimony of all three experts and of the individual plaintiffs, the district court declared that § 692A.2A was unconstitutional on several grounds, to wit: that it was an unconstitutional *ex post facto* law with respect to offenders who committed an offense prior to July 1, 2002; that it violated the plaintiffs' rights to avoid self-incrimination because, coupled with registration requirements elsewhere in Chapter 692A, it required offenders to report their addresses even if those addresses were not in compliance with § 692A.2A; that it violated procedural due process rights of the plaintiffs; and that it violated the plaintiffs' rights under the doctrine of substantive due process, because it infringed fundamental rights to travel and to "privately choose how they want to conduct their family affairs," and was not narrowly tailored to serve a compelling state interest. Although the district court believed the law was punitive, the court rejected the plaintiffs' final argument that the law imposed cruel and unusual punishment in violation of the Eighth Amendment. Having found the statute unconstitutional, the district court issued a permanent injunction against enforcement. *Doe v. Miller*, 298 F.Supp.2d at 880.

II.

[1] We first address the contention that § 692A.2A violates the rights of the covered sex offenders to due process of law under the Fourteenth Amendment. The appellees (to whom we will refer as "the Does") argue that the statute is unconstitutional because it fails to provide adequate notice of what conduct is prohibited, and because it does not require an individualized determination whether each person covered by the statute is dangerous. This claim relies on what is known as "procedural due process."

[2] The Due Process Clause provides that no State shall deprive any person of life, liberty, or property without due process of law. The requirement of "due process" has led to the judicial doctrine of vagueness, which requires that a criminal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

[3][4] There is no argument here that the words of the statute are unconstitutionally vague. Rather, the Does contend that they are deprived of notice required by the Constitution because some cities in Iowa are unable to provide sex offenders with information about the location of all schools and registered child care facilities, and because it is difficult to measure the restricted areas, which are measured "as the crow flies" from a school or child care facility. We disagree that these potential problems render the statute unconstitutional on its face. A criminal statute is not vague on its face unless it is "impermissibly vague in all of its applications," *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), and the possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute. A sex offender subject to prosecution under those circumstances may seek to establish a violation of due process through a challenge to enforcement of the statute as applied to him in a specific case. Nor do we believe that the potential for varied enforcement of the restriction, ***709** which was cited by the district court, 298 F.Supp.2d at 878, justifies invalidating the entire regulatory scheme. Due process does not require that independently elected county attorneys enforce each criminal statute with equal vigor, and the existence of different priorities or prosecution decisions among jurisdictions does not violate the Constitution.

[5][6] The Does also argue that § 692A.2A unconstitutionally forecloses an "opportunity to be heard" because the statute provides no process for individual determinations of dangerousness. This argument misunderstands the right to procedural due process. As the Supreme Court recently explained in connection with a comparable challenge to Connecticut's sex offender registration law, "even assuming, *arguendo*, that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). States "are not barred by principles of '*procedural* due process' from drawing" classifications among sex offenders and other individuals. *Id.* at 8, 123 S.Ct. 1160 (quoting

Michael H. v. Gerald D., 491 U.S. 110, 120, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion)) (emphasis in original).

[7] We likewise conclude that the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren. Unless the Does can establish that the *substantive* rule established by the legislative classification conflicts with some provision of the Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification. *Id.* at 7-8, 123 S.Ct. 1160. Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.

III.

[8] The Does also assert that the residency restriction is unconstitutional under the doctrine of substantive due process. They rely on decisions of the Supreme Court holding that certain liberty interests are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The Does argue that several "fundamental rights" are infringed by Iowa's residency restriction, including the "right to privacy and choice in family matters," the right to travel, and "the fundamental right to live where you want." The district court agreed that § 692A.2A infringed upon liberty interests that constitute fundamental rights, applied strict scrutiny to the legislative classifications, and concluded that the statute was unconstitutional.

The Does first invoke "the right to personal choice regarding the family." They cite the Supreme Court's statement in *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), that "certain intimate human relationships must be secured against undue intrusion by the State because of the role ***710** of such relationships in safeguarding the individual freedom that is central to our constitutional scheme," and the Court's discussion of "marital privacy" in *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). They also rely heavily on the Court's decision in *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), which held unconstitutional a zoning ordinance that defined "family" in such a way as to prohibit a grandmother and her two grandsons from living together in an area designated for "single family" dwellings. A plurality of the Court in *Moore* reasoned that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," and concluded that the governmental interests advanced by the city were insufficient to justify an ordinance that "slic[ed] deeply into the family itself." *Id.* at 498-99, 97 S.Ct. 1932 (plurality opinion). Justice Stevens concurred in the judgment on other grounds. *Id.* at 513-21, 97 S.Ct. 1932.

[9] We do not believe that the residency restriction of § 692A.2A implicates any fundamental right of the Does that would trigger strict scrutiny of the statute. In evaluating this argument, it is important to consider the Supreme Court's admonition that " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' " *Flores*, 507 U.S. at 302, 113 S.Ct. 1439 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). While the Court has not directed that an asserted right be defined at the most specific level of tradition supporting or denying the asserted right, *cf. Michael H. v. Gerald D.*, 491 U.S. at 127 n. 6, 109 S.Ct. 2333 (1989) (opinion of Scalia, J.), the Does' characterization of a fundamental right to "personal choice regarding the family" is so general that it would trigger strict scrutiny of innumerable laws and ordinances that influence "personal choices" made by families on a daily basis. The Supreme Court's decision in *Griswold* and the plurality opinion in *Moore* did recognize unenumerated constitutional rights relating to personal choice in matters of marriage and family life, but they defined the recognized rights more narrowly, in terms of "intimate relation of husband and wife," *Griswold*, 381 U.S. at 482, 85 S.Ct. 1678, or "intrusive regulation" of "family living arrangements." *Moore*, 431 U.S. at 499, 97 S.Ct. 1932 (plurality opinion).

Unlike the precedents cited by the Does, the Iowa

statute does not operate directly on the family relationship. Although the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences. The plurality in *Moore* emphasized this distinction, observing that the impact on family was "no mere incidental result of the ordinance," because "[o]n its face [the ordinance] selects certain categories of relatives who may live together and declares that others may not." 431 U.S. at 498-99, 97 S.Ct. 1932 (plurality opinion). Thus, the reasoning of the *Moore* plurality does not require strict scrutiny of a regulation that has an incidental or unintended effect on the family, *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir.1985) (upholding requirement that firemen reside within city limits), or that "affects or encourages decisions on family matters" but does not force such choices. *Gorrie v. Bowen*, 809 F.2d 508, 523 (8th Cir.1987) (upholding regulation requiring that applications for public assistance for dependent children include siblings living in same ***711** household). Similarly, the Court in *Griswold* disclaimed authority to determine "the wisdom, need, and propriety" of all laws that touch social conditions, but held unconstitutional a state statute that "operate[d] directly on an intimate relation of husband and wife." 381 U.S. at 482, 85 S.Ct. 1678.

While there was evidence that one adult sex offender in Iowa would not reside with his parents as a result of the residency restriction, that another sex offender and his wife moved 45 miles away from their preferred location due to the statute, and that a third sex offender could not reside with his adult child in a restricted zone, the statute does not directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute. We therefore hold that § 692A.2A does not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny.

[10] The Does also assert that the residency restrictions interfere with their constitutional right to travel. The modern Supreme Court has recognized a right to interstate travel in several decisions, beginning with *United States v. Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), and *Shapiro v. Thompson*, 394 U.S. 618, 629-30, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). The Court subsequently explained that the federal guarantee of interstate travel "protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n. 6, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982)). Most recently, the Court summarized that the right to interstate travel embraces at least three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).

Although the district court, like some other courts, considered the first component of a right to interstate travel under the rubric of "substantive due process," the Supreme Court has not identified the textual source of that component. The Court has observed that the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," and suggested that this right "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.' " *Id.* at 501 & n. 3, 119 S.Ct. 1518 (quoting *Guest*, 383 U.S. at 758, 86 S.Ct. 1170). The latter two components of the right identified in *Saenz* arise from the Privileges and Immunities Clause of Article IV, § 2, and the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.*

The Does argue that § 692A.2A violates this right to interstate travel by substantially limiting the ability of sex offenders to establish residences in any town or urban area in Iowa. They contend that the constitutional right to travel is implicated because the Iowa law deters previously convicted sex offenders from migrating from other States to Iowa. The district court agreed, reasoning that the statute "effectively bans sex offenders from residing in large sections of Iowa's towns and cities." 298 F.Supp.2d at 874.

***712** We respectfully disagree with this analysis. The Iowa statute imposes no obstacle to a sex offender's entry into Iowa, and it does not erect an "actual barrier to interstate movement." *Bray*, 506 U.S. at 277, 113 S.Ct. 753 (internal quotation omitted). There is "free ingress and regress to and from" Iowa for sex offenders, and the statute thus does not "directly impair the exercise of the right to free interstate movement." *Saenz*, 526 U.S. at 501, 119 S.Ct. 1518. Nor does the Iowa statute violate principles of equality by treating nonresidents who

visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa. We think that to recognize a fundamental right to interstate travel in a situation that does not involve any of these circumstances would extend the doctrine beyond the Supreme Court's pronouncements in this area. That the statute may deter some out-of-state residents from traveling to Iowa because the prospects for a convenient and affordable residence are less promising than elsewhere does not implicate a fundamental right recognized by the Court's right to travel jurisprudence. [FN3]

> FN3. In its analysis of the right to interstate travel, the district court also expressed concern that a sex offender might be compelled to avoid Iowa altogether, lest he establish an unlawful residence by "unwittingly falling asleep" at a location within 2000 feet of a school or child care facility. 298 F.Supp.2d at 875. The court stated that "[l]iteral application of the Act would result in the great majority of the State's hotels and motels being restricted to traveling sex offenders," and that "community centers such as homeless shelters and missions will most likely be unavailable to sex offenders because of location." *Id.* This led the court to conclude that "sex offenders would appear to be able to travel to Iowa freely only so long as they do not stop." *Id.*
>
> We question whether these concerns are even applicable to the plaintiffs, given that the plaintiff class was defined as those sex offenders "currently living" in Iowa or "might wish to live" in Iowa, not vacationers or cross-country travelers. *Id.* at 847. In any event, the Does do not rely on these factual assertions in defending the judgment of the district court, and we do not find evidence in the record that would support a specific finding about the proximity of hotels, motels, homeless shelters, and missions throughout Iowa to schools and child care facilities.

[11] The Does also assert that § 692A.2A infringes upon a fundamental constitutional right to *intra* state travel. The Supreme Court has not decided whether there is a fundamental right to intrastate travel, *see Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255-56, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), although it observed long ago that under the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States v. Wheeler*, 254 U.S. 281, 293, 41 S.Ct. 133, 65 L.Ed. 270 (1920). During the same era, the Court also commented that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty ... secured by the 14th Amendment," *Williams v. Fears*, 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.Ed. 186 (1900), but as the Third Circuit observed, "[i]t is unclear whether the travel aspect of cases like *Fears* can be severed from the general spirit of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), now thoroughly discredited, that was so prominent in the substantive due process analysis of that period." *Lutz v. City of York*, 899 F.2d 255, 266 (3d Cir.1990).

Some of our sister circuits have recognized a fundamental right to intrastate ***713** travel in the context of a "drug exclusion zone" that banned persons from an area of a city for a period of time, *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-98 (6th Cir.2002), an ordinance that outlawed "cruising" and thus limited the ability of persons to drive on certain major public roads, *Lutz*, 899 F.2d at 268, and a law that created a durational residency requirement as a condition of eligibility for public housing. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647-48 (2d Cir.1971). The Second Circuit, for example, reasoned that it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id.* at 648; *see also Johnson*, 310 F.3d at 497 n. 4; *Lutz*, 899 F.2d at 261. Other decisions have held that there is *no* fundamental right to intrastate travel in the context of a bona fide residency requirement imposed as a condition of municipal employment. *Andre v. Bd. of Trs. of Maywood*, 561 F.2d 48, 52-53 (7th Cir.1977); *Wardwell v. Bd. of Educ.*, 529 F.2d 625, 627 (6th Cir.1976); *Wright v. City of Jackson*, 506 F.2d 900, 901- 02 (5th Cir.1975); *see also Doe v. City of Lafayette*, 377 F.3d 757, 770-71 (7th Cir.2004) (en banc) (holding that city's ban of sex offender from all public parks did not implicate fundamental right to intrastate travel, where offender was "not limited in moving from place to place within his locality to socialize with friends and family, to participate in gainful employment or to go to the market to buy food and clothing"); *Hutchins v. District of*

Columbia, 188 F.3d 531, 538-39 (D.C.Cir.1999) (en banc) (holding that there is no fundamental right for juveniles to be in a public place without adult supervision during curfew hours).

We find it unnecessary in this case to decide whether there is a fundamental right to intrastate travel under the Constitution, because assuming such a right is recognized, it would not require strict scrutiny of § 692A.2A. The district court and the Does cite the Sixth Circuit's decision in *Johnson* for the proposition that there is a fundamental right to intrastate travel. Accepting that view for purposes of analysis, we believe that any fundamental right to intrastate travel would likely be "correlative" to the right to interstate travel discussed in *Saenz, see Johnson*, 310 F.3d at 497 n. 4, or would consist of a "right to travel locally through public spaces and roadways." *Id.* at 498. Therefore, the Iowa statute would not implicate a right to intrastate travel for the same reasons that it does not implicate the right to interstate travel. The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement. In this sense, the Iowa law is comparable to the municipal residency requirements that have been held to implicate no fundamental right to intrastate travel in *Andre, Wardwell* and *Wright,* and less restrictive on freedom of movement than the ban on access to public parks upheld under rational basis review in *Doe v. City of Lafayette.* By contrast, the decisions finding infringement of a fundamental right to intrastate travel have involved laws that trigger concerns not present here--interference with free ingress to and egress from certain parts of a State (*Johnson* and *Lutz*) or treatment of new residents of a locality less favorably than existing residents (*King*).

[12] The Does also urge that we recognize a fundamental right "to live where you want." This ambitious articulation of a proposed unenumerated right calls to mind the Supreme Court's caution that we should proceed with restraint in the area ***714** of substantive due process, because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Some thirty years ago, our court said "we cannot agree that the right to choose one's place of residence is necessarily a fundamental right," *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir.1974), and we see no basis to conclude that the contention has gained strength in the intervening years. The Supreme Court recently has restated its reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended," *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258 (quoting *Collins*, 503 U.S. at 125, 112 S.Ct. 1061), and the Does have not developed any argument that the right to "live where you want" is "deeply rooted in this Nation's history and tradition," *id.* at 721, 117 S.Ct. 2258 (quoting *Moore*, 431 U.S. at 503, 97 S.Ct. 1932 (plurality opinion)) or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed." *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). We are thus not persuaded that the Constitution establishes a right to "live where you want" that requires strict scrutiny of a State's residency restrictions.

[13] Because § 692A.2A does not implicate a constitutional liberty interest that has been elevated to the status of "fundamental right," we review the statute to determine whether it meets the standard of "rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306, 113 S.Ct. 1439. The Does acknowledge that the statute was designed to promote the safety of children, and they concede that this is a legitimate state interest. They also allow that perhaps "certain identifiable sex offenders should not live right across the street from a school or perhaps anywhere else where there are children." (Appellees' Br. at 51). The Does contend, however, that the statute is irrational because there is no scientific study that supports the legislature's conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children.

We reject this contention because we think it understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable. Although the Does introduced one report from the Minnesota Department of Corrections finding "no evidence in Minnesota that residential proximity of sex offenders to schools or parks affects reoffense," this solitary case study--which involved only thirteen reoffenders released from prison between 1997 and 1999--does not make irrational the decision of the Iowa General Assembly and the Governor of Iowa to reach a different predictive judgment for Iowa. As the district

court observed, twelve other States have enacted some form of residency restriction applicable to sex offenders. [FN4] There can be ***715** no doubt of a legislature's rationality in believing that "[s]ex offenders are a serious threat in this Nation," and that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 123 S.Ct. 1160 (alterations in original) (quoting *McKune v. Lile*, 536 U.S. 24, 32-33, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion)). The only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children.

> FN4. *See* Ala.Code § 15-20-26(a) ("Unless otherwise exempted by law, no adult criminal sex offender shall establish a residence or accept employment within 2,000 feet of the property on which any school or child care facility is located."); Ark.Code Ann. § 5-14-128(a) ("It shall be unlawful for a sex offender who is required to register ... and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2000') of the property on which any public or private elementary or secondary school or daycare facility is located."); Cal.Penal Code § 3003(g) ("[A]n inmate who is released on parole for any violation of [sections prohibiting lewd or lascivious acts, or continued sexual abuse of a child] shall not be placed or reside ... within one one-quarter mile of any public or private school."); Fla. Stat. Ann. § 947.1405(7)(a)(2) ("Any inmate convicted of [certain sexual crimes against minors] and ... subject to conditional release supervision ... [is prohibited from] living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop or other place where children regularly congregate."); Ga.Code Ann. § 42-1-13(b) ("No individual required to register ... shall reside within 1,000 feet of any child care facility, school, or area where minors congregate."); 720 Ill. Comp. Stat. § 5/11-9.3(b-5) ("It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building ..."); Ky.Rev.Stat. Ann. § 17.495 ("No registrant ... who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility."); La.Rev.Stat. § 14:91.1(A)(2) ("Unlawful presence of a sexually violent predator is ... the physical residing of a sexually violent predator within one thousand feet of any public or private, elementary or secondary school, a day care facility, playground, public or private youth center, public swimming pool, or free standing video arcade facility."); Ohio Rev.Code Ann. § 2950.031(A) ("No person who has been convicted of ... either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises."); Okl. Stat. tit. 57, § 590 ("It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution."); Or.Rev.Stat. § 144.642(1)(a) (Rules for post-prison supervision or parole "shall include ...a general prohibition against allowing a sex offender to reside near locations where children are the primary occupants or users."); Tenn.Code Ann. § 40-39- 211(a) ("No sexual offender, ... or violent sexual offender, ... shall knowingly reside or work within one thousand feet (1,000') of the property on which any public school, private or parochial school, licensed day care center, or any other child care facility is located.").

[14] We think the decision whether to set a limit on proximity of "across the street" (as appellees suggest), or 500 feet or 3000 feet (as the Iowa Senate considered and rejected, *see* S. Journal 79, 2d Sess., at 521 (Iowa 2002)), or 2000 feet (as the Iowa General Assembly and the Governor eventually adopted) is the sort of task for which the elected policymaking officials of a State, and not the federal courts, are properly suited. The legislature is institutionally equipped to weigh the benefits and burdens of various distances, and to reconsider its initial decision in light of experience and data accumulated over time. The State of Alabama, for example, originally adopted a residency restriction of 1000 feet, but later increased the distance to 2000 feet, Ala.Code § 15-20-26(a); *see also* 2000 Ala. Acts 728, § 1; 1999 Ala. Acts 572, § 3, while the

Minnesota legislature apparently followed the recommendation of the State's Department of Corrections that no blanket proximity restriction should be adopted. (Appellee's App. at 338). Where individuals in a group, such as convicted sex offenders, have "distinguishing ***716** characteristics relevant to interests the State has authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

The record does not support a conclusion that the Iowa General Assembly and the Governor acted based merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group. *Cf. Cleburne*, 473 U.S. at 448, 105 S.Ct. 3249; *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). Sex offenders have a high rate of recidivism, and the parties presented expert testimony that reducing opportunity and temptation is important to minimizing the risk of reoffense. Even experts in the field could not predict with confidence whether a particular sex offender will reoffend, whether an offender convicted of an offense against a teenager will be among those who "cross over" to offend against a younger child, or the degree to which regular proximity to a place where children are located enhances the risk of reoffense against children. One expert in the district court opined that it is just "common sense" that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense. (Appellant's App. at 165). The policymakers of Iowa are entitled to employ such "common sense," and we are not persuaded that the means selected to pursue the State's legitimate interest are without rational basis.

IV.

[15] The Does next argue that the residency restriction, "in combination with" the sex offender registration requirements of § 692A.2, unconstitutionally compels sex offenders to incriminate themselves in violation of the Fifth and Fourteenth Amendments. The district court concluded that a sex offender who establishes residence in a prohibited area must either register his current address, thereby "explicitly admit[ting] the facts necessary to prove the criminal act," or "refuse to register and be similarly prosecuted." 298 F.Supp.2d at 879. The court then held that § 692A.2A "unconstitutionally requires sex offenders to provide incriminating evidence against themselves," and enjoined enforcement of the residency restriction on this basis as well.

We disagree that the Self-Incrimination Clause of the Fifth Amendment renders the residency restriction of § 692A.2A unconstitutional. Our reason is straightforward: the residency restriction does not compel a sex offender to be a witness against himself or a witness of any kind. The statute regulates only where the sex offender may reside; it does not require him to provide any information that might be used against him in a criminal case. A *separate* section of the Iowa Code, § 692A.2, requires a sex offender to register his address with the county sheriff. The Does have not challenged the constitutionality of the registration requirement, or sought an injunction against its enforcement, and whatever constitutional problem may be posed by the registration provision does not justify invalidating the residency restriction.

None of the authorities cited by the Does supports invalidation of a substantive rule of law because a reporting or registration requirement allegedly compels a person in violation of that substantive rule to incriminate himself. The Supreme Court held in ***717***Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), that a gambler was privileged under the Fifth Amendment not to register his occupation as one in the business of accepting wagers, not to pay the required occupational tax, and not to pay a wagering excise tax, because these submissions would create a real and appreciable hazard of self-incrimination for the gambler. The Court never suggested, however, that the Self-Incrimination Clause prevented the government from criminalizing wagering or gambling. Similarly, in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Court's holding that a plea of self-incrimination was a complete defense in a prosecution for non-compliance with provisions requiring payment of a tax on marijuana imported into the United States did not imply that state laws prohibiting the possession of marijuana were somehow unconstitutional. *Id.* at 29, 89 S.Ct. 1532. And in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), where the Court held unconstitutional under the Fifth Amendment a requirement that members of the Communist Party file a registration statement with the Attorney General, it was never intimated that

the registration requirement rendered unconstitutional Section 4(a) of the Subversive Activities Control Act, under which Albertson might have been prosecuted as a result of the registration.

Even had the Does challenged the sex offender registration statute, moreover, we believe that a self-incrimination challenge to the registration requirements would not be ripe for decision. Unlike *Albertson,* where the petitioners had asserted the privilege against self-incrimination on multiple occasions, the Attorney General of the United States had rejected their claims, and specific orders requiring the petitioners to register had been issued, 382 U.S. at 75, 86 S.Ct. 194, the process with respect to enforcement of the Iowa sex offender registration statute in conjunction with the residency restriction is far less developed. The record does not show whether any of the plaintiffs has registered with the county sheriff an address that is prohibited by § 692A.2A, whether any of the county attorneys or the Attorney General would seek to use registration information to further a criminal prosecution for violation of the residency restriction (rather than merely as a regulatory mechanism to bring sex offenders into compliance with the statute), [FN5] or whether the prosecuting authorities would recognize a refusal to register as a valid assertion of the privilege against self-incrimination (and thus decline to prosecute a sex offender for failing to register a prohibited residence).

> FN5. There is evidence in the record that some Iowa law enforcement authorities, rather than immediately file charges against an offender found to be residing in a restricted zone, have withheld charges while the offender sought housing in an unrestricted area. (T. Tr. at 229).

We think that under these circumstances, a self-incrimination challenge to the registration statute would be premature. *See Communist Party v. Subversive Activities Control Bd.,* 367 U.S. 1, 106-10, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961); *cf Selective Serv. Sys. v. Minn. Pub. Interest Research Group,* 468 U.S. 841, 858, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984). If and when there is a prosecution for violation of the residency restriction in which the prosecution makes use of a sex offender's registration, a prosecution for failure to register a prohibited address, or some other basis such as in *Albertson* to say that the ***718** dispute is ripe, then the self-incrimination issue will be joined. It would then be appropriate to consider such questions as whether the registration requirement as applied falls under the rule of cases such as *Marchetti* and *Albertson,* where the Fifth Amendment was held to prohibit incriminating registration or reporting requirements directed at persons "inherently suspect of criminal activities," *Albertson,* 382 U.S. at 79, 86 S.Ct. 194, or whether the public need for information about convicted sex offenders and the noncriminal regulatory purpose for securing the information might permit enforcement of the requirement consistent with the Fifth Amendment. *Cf. Baltimore City Dep't of Soc. Servs. v. Bouknight,* 493 U.S. 549, 557-59, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990); *California v. Byers,* 402 U.S. 424, 431-34, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971) (plurality opinion); *id.* at 457-58, 91 S.Ct. 1535 (Harlan, J., concurring in the judgment). At this point, we conclude that the Does' self-incrimination claim is both misdirected and premature.

V.

[16][17][18] A final, and narrower, challenge advanced by the Does is that § 692A.2A is an unconstitutional *ex post facto* law because it imposes retroactive punishment on those who committed a sex offense prior to July 1, 2002. The *Ex Post Facto* Clause of Article I, Section 10 of the Constitution prohibits the States from enacting laws that increase punishment for criminal acts after they have been committed. *See generally Calder v. Bull,* 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798) (Chase, J., seriatim). In determining whether a state statute violates the *Ex Post Facto* Clause by imposing such punishment, we apply the framework outlined in *Smith v. Doe,* 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), where the Supreme Court considered an *ex post facto* challenge to an Alaska statute requiring sex offenders to register. Under that framework, we must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Id.* (internal quotation omitted). If the legislature intended criminal punishment, then the legislative intent controls the inquiry and the law is necessarily punitive. *Id.* If, however, the legislature intended its law to be civil and nonpunitive, then we must determine whether the law is nonetheless "so punitive either in purpose or effect as to negate" the State's nonpunitive intent. *Id.* (internal quotations and citations omitted). "[O]nly the clearest proof" will transform what the legislature has denominated a civil regulatory measure into a criminal penalty. *Id.*

[19] The district court found that in passing the residency restriction of § 692A.2A, the Iowa General Assembly intended to create "a civil, non-punitive

statutory scheme to protect the public." 298 F.Supp.2dat 868. The Does do not dispute this conclusion on appeal, and we agree that the legislature's intent was not punitive. Although Iowa Code § 692A.2A does not contain any clear statement of purpose, the residency restriction is codified as part of Chapter 692A, together with a registration system that the Supreme Court of Iowa has declared to have a purpose of "protect[ing] society" and to be a nonpunitive, regulatory law. *In Interest of S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997). "[W]here a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Smith v. Doe*, 538 U.S. at 93-94, 123 S.Ct. 1140 (quoting ***719***Flemming v. Nestor*, 363 U.S. 603, 616, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)) (internal marks omitted). We believe the available evidence leads most naturally to the inference that the restrictions in § 692A.2A are intended, like the restrictions elsewhere in the same chapter, to protect the health and safety of Iowa citizens. Therefore, we conclude that the purpose of the Iowa General Assembly in passing this law was regulatory and non-punitive.

We must next consider whether the Does have established that the law was nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme. In this inquiry, we refer to what the Supreme Court described in *Smith v. Doe* as "useful guideposts" for determining whether a law has a punitive effect. In analyzing the effect of the Alaska sex offender registration law, the Court in *Smith* pointed to five factors drawn from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), as particularly relevant: whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose. *Smith v. Doe*, 538 U.S. at 97, 123 S.Ct. 1140. These factors are "neither exhaustive nor dispositive," *id.* (quotation omitted), and while we consider them as an aid to our analysis, we bear in mind that the ultimate question always remains whether the punitive effects of the law are so severe as to constitute the "clearest proof" that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment.

Turning first to any historical tradition regarding residency restrictions, the Does argue that § 692A.2A is the effective equivalent of banishment, which has been regarded historically as a punishment. *See Smith v. Doe*, 538 U.S. at 98, 123 S.Ct. 1140. Banishment has been defined as " 'punishment inflicted on criminals by compelling them to quit a city, place, or country for a specified period of time, or for life,' " *United States v. Ju Toy*, 198 U.S. 253, 269-70, 25 S.Ct. 644, 49 L.Ed. 1040 (1905) (Brewer, J., dissenting) (quoting *Black's Law Dictionary*), or "expulsion from a country." *Black's Law Dictionary* 154, 614 (8th ed.2004). The Supreme Court most recently explained that banished offenders historically could not "return to their original community," and that the banishment of an offender "expelled him from the community." *Smith v. Doe*, 538 U.S. at 98, 123 S.Ct. 1140; *see also Fong Yue Ting v. United States*, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (holding that order of deportation is "not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment").

While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, § 692A.2A restricts only where offenders may reside. It does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence. With respect to many offenders, the statute does not even require a change of residence: the Iowa General Assembly included a grandfather provision that permits sex offenders to maintain a residence that was established prior to July 1, 2002, even if that residence is within 2000 feet of a school or child care facility. Iowa Code ***720** § 692A.2A(4)(c). The district court, moreover, found that residency restrictions for sex offenders "are relatively new and somewhat unique," 298 F.Supp.2d at 849 n. 4, and as with sex offender registration laws, which also were of "fairly recent origin," *Smith v. Doe*, 538 U.S. at 97, 123 S.Ct. 1140 (internal quotation omitted), this novelty "suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Id.* We thus conclude that this law is unlike banishment in important respects, and we do not believe it is of a type that is traditionally punitive.

The second factor that we consider is whether the law promotes the traditional aims of punishment--deterrence and retribution. *Smith v. Doe,* 538 U.S. at 102, 123 S.Ct. 1140. The district court found that the law was both deterrent and retributive, and thus weighed this factor in favor of its finding that the law was punitive. We agree with the district court that the law could have a deterrent effect, but we do not agree that the deterrent effect provides a strong inference that the restriction is punishment. The primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime. We observe, moreover, that the Supreme Court has cautioned that this factor not be over-emphasized, for it can "prove[ ] too much," as "[a]ny number of governmental programs might deter crime without imposing punishment." *Id.*

The statute's "retributive" effect is similarly difficult to evaluate. For example, while the Ninth Circuit found punishment where the length of sex offender reporting requirements corresponded to the degree of wrongdoing rather than the extent of the risk imposed, *Doe I v. Otte,* 259 F.3d 979, 990 (9th Cir.2001), *rev'd sub nom. Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the Supreme Court disagreed, and instead emphasized that the reporting requirements were "reasonably related to the danger of recidivism" in a way that was "consistent with the regulatory objective." *Smith v. Doe,* 538 U.S. at 102, 123 S.Ct. 1140. While any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect, we believe that § 692A.2A, like the registration requirement in *Smith v. Doe,* is consistent with the legislature's regulatory objective of protecting the health and safety of children.

The next factor we consider is whether the law "imposes an affirmative disability or restraint." Imprisonment is the "paradigmatic" affirmative disability or restraint, *Smith v. Doe,* 538 U.S. at 100, 123 S.Ct. 1140, but other restraints, such as probation or occupational debarment, also can impose some restriction on a person's activities. *Id.* at 100-01, 123 S.Ct. 1140. While restrictive laws are not necessarily punitive, they are more likely to be so; by contrast, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100, 123 S.Ct. 1140. For example, sex offender registration laws, requiring only periodic reporting and updating of personal information, do not have a punitive restraining effect. *Id.* at 102, 123 S.Ct. 1140. At the same time, civil commitment of the mentally ill, though extremely restrictive and disabling to those who are committed, does not necessarily impose punishment because it bears a reasonable relationship to a "legitimate nonpunitive objective," namely protecting the public from mentally unstable ***721** individuals. *Hendricks,* 521 U.S. at 363, 117 S.Ct. 2072.

Iowa Code § 692A.2A is more disabling than the sex offender registration law at issue in *Smith v. Doe,* which had not "led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." 538 U.S. at 100, 123 S.Ct. 1140. Although the Does did not present much evidence about housing within restricted areas that would have been available to them absent the statute, they did show that some sex offenders would have lived with spouses or parents who owned property in the restricted zones, and some sex offenders were living in residences within restricted areas that were permitted under the statute's "grandfather" provision. The residency restriction is certainly less disabling, however, than the civil commitment scheme at issue in *Hendricks,* which permitted complete confinement of affected persons. In both *Smith* and *Hendricks,* the Court considered the degree of the restraint involved in light of the legislature's countervailing nonpunitive purpose, and the Court in *Hendricks* emphasized that the imposition of an affirmative restraint "does not inexorably lead to the conclusion that the government has imposed punishment." 521 U.S. at 363, 117 S.Ct. 2072 (internal quotation omitted). Likewise here, while we agree with the Does that § 692A.2A does impose an element of affirmative disability or restraint, we believe this factor ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose.

[20] This final factor--whether the regulatory scheme has a "rational connection to a nonpunitive purpose"--is the "most significant factor" in the *ex post facto* analysis. *Smith v. Doe,* 538 U.S. at 102, 123 S.Ct. 1140. The requirement of a "rational connection" is not demanding: A "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103, 123 S.Ct. 1140. The district court found "no doubt"

that § 692A.2A has a purpose other than punishing sex offenders, 298 F.Supp.2d at 870, and we agree. In light of the high risk of recidivism posed by sex offenders, *see Smith v. Doe*, 538 U.S. at 103, 123 S.Ct. 1140, the legislature reasonably could conclude that § 692A.2A would protect society by minimizing the risk of repeated sex offenses against minors.

[21] The district court nonetheless concluded that the statute is excessive in relation to this purpose, because the law applies "regardless of whether a particular offender is a danger to the public." 298 F.Supp.2d at 871. The absence of a particularized risk assessment, however, does not necessarily convert a regulatory law into a punitive measure, for "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, 538 U.S. at 103, 123 S.Ct. 1140. The Supreme Court over the years has held that restrictions on several classes of offenders are nonpunitive, despite the absence of particularized determinations, including laws prohibiting the practice of medicine by convicted felons, *Hawker v. New York*, 170 U.S. 189, 197, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), laws prohibiting convicted felons from serving as officers or agents of a union, *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (plurality opinion); *id.* at 160-61, 80 S.Ct. 1146 (opinion of Brennan, J.), and of course laws ***722** requiring the registration of sex offenders. *Smith v. Doe*, 538 U.S. at 106, 123 S.Ct. 1140.

In this case, we conclude that a categorical rule is consistent with the legislature's regulatory purpose and not "excessive" within the meaning of the Supreme Court's decisions. While the Does argue that the legislature must tailor restrictions to the individual circumstances of different sex offenders, we view this position as inconsistent with the Supreme Court's direction that the "excessiveness" prong of the *ex post facto* analysis does not require a "close or perfect fit" between the legislature's nonpunitive purpose and the corresponding regulation. The evidence presented at trial suggested that convicted sex offenders as a class were more likely to commit sex offenses against minors than the general population. Dr. McEchron indicated that "there are never any guarantees that [sex offenders] won't reoffend," (Appellant's App. at 162), and Mr. Allison testified that "any sex offender is always going to be of some concern forever." (T. Tr. at 279).

More specifically, in Allison's view, even an offender who committed a crime involving an older victim, such as statutory rape, would be of concern around a day care or elementary school, although the concern may be reduced, (T. Tr. at 278), and Dr. Rosell testified that while he believed that a sex offender who committed an offense with a 14 or 15-year-old victim was likely to stay in that age range, there also was no way to predict whether a sex offender would "cross over" in selecting victims from adults to children or males to females. (Appellee's App. at 149, 184). Dr. Rosell was less than definitive about the degree to which sex offenders' future behavior was predictable and avoidable; while he personally did not believe residential proximity made "that big of a difference," he agreed that "what works in criminal justice is imprecise at best," and testified that "[t]here is always a risk" of reoffense. (Appellee's App. at 193, 195, 190). In view of the higher-than-average risk of reoffense posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism, we do not believe the Does have established that Iowa's decision to restrict all such offenders from residing near schools and child care facilities constitutes punishment despite the legislature's regulatory purpose.

[22] The Does also urge that the law is excessive in relation to its regulatory purpose because there is no scientific evidence that a 2000-foot residency restriction is effective at preventing sex offender recidivism. "The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but rather an inquiry into "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith v. Doe*, 538 U.S. at 105, 123 S.Ct. 1140. In this case, there was expert testimony that reducing the frequency of contact between sex offenders and children is likely to reduce temptation and opportunity, which in turn is important to reducing the risk of reoffense. None of the witnesses was able to articulate a precise distance that optimally balanced the benefit of reducing risk to children with the burden of the residency restrictions on sex offenders, and the Does' expert acknowledged that "[t]here is nothing in the literature that has addressed proximity." (Appellee's App. 198; *accord id.* at 41, 47-48 (testimony of Dr. McEchron)). As even Dr. Rosell admitted, we just "don't know" that the Iowa Legislature "isn't ahead of the curve." (*Id.* at 198).

***723** We believe the legislature's decision to select a

2000-foot restriction, as opposed to the other distances that were considered and rejected, is reasonably related to its regulatory purpose. Given the challenge in determining precisely what distance is best suited to minimize risk to children without unnecessarily restricting sex offenders, and the difficult policy judgments inherent in that choice, we conclude that the Does have not established the "clearest proof" that Iowa's choice is excessive in relation to its legitimate regulatory purpose, such that a statute designed to be nonpunitive and regulatory should be considered retroactive criminal punishment. [FN6]

> FN6. In view of our conclusion that the statute is not punitive, it follows that the law is not a "cruel and unusual punishment" in violation of the Eighth Amendment. *See Smith v. Doe*, 538 U.S. at 97, 123 S.Ct. 1140 (explaining that factors used in determining whether law is punishment for *ex post facto* purposes "have their earlier origins in cases under the Sixth and Eighth Amendments"); *Trop v. Dulles*, 356 U.S. 86, 94-99, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). Even assuming that § 692A.2A were punitive, we would agree with the district court that the law is neither barbaric nor grossly disproportionate to the offenses committed by the Does. We therefore reject the Eighth Amendment argument urged by the appellees as an alternative ground for affirming the district court.

* * * * * *

The judgment of the district court is reversed, and the case is remanded with directions to enter judgment in favor of the defendants.

MELLOY, Circuit Judge, concurring and dissenting.

I join in the majority's opinion, sections I through IV. However, I dissent as to section V because I believe section 692A.2A is an unconstitutional ex post facto law.

The U.S. Constitution prohibits states from passing ex post facto laws. U.S. Const. art. I, § 10, cl. 1. " 'Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,' " is an ex post facto law. *Stogner v. California*, 539 U.S. 607, 612, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798)).

As set out by the majority, the fundamental question the Court must decide is whether the residency requirement amounts to punishment. We do so by first asking whether the legislature intended the statute to be punitive. If the answer is in the affirmative, that ends our inquiry, and we find the legislation to be an ex post facto law. However, if the legislature intended the statute to be nonpunitive, "we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (internal quotations and citation omitted). I agree with the majority that the purpose of section 692A.2A is to protect the public. This purpose is nonpunitive, so we must determine if the statute "is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.*

I also agree with the majority that the factors outlined in *Smith* should guide our analysis. However, I part ways with the majority as to how some of the individual factors should be examined and as to the final outcome of the multi-factor analysis.

1. Have measures like the residency restriction historically been regarded as punishment?

The majority concedes that banishment has historically been regarded as punishment, ***724** but points out how the residency restriction differs from banishment. The majority concludes that section 692A.2A is not the type of law that has historically been regarded as punishment. I would find that, although section 692A.2A does not amount to full banishment, it sufficiently resembles banishment to make this factor weigh towards finding the law punitive.

The district court made the following factual findings on the availability of housing:

> [S]ex offenders are completely banned from living in a number of Iowa's small towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited. Although some areas are completely unrestricted, these are either very small towns without any services, or farmland.

* * * * * *

In larger cities such as Des Moines and Iowa City,

the maps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or childcare facility, the entire town is often engulfed by the excluded area. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher and Tiffin are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or childcare facility remain available, as does the country, but available housing in those areas is not necessarily readily available.

These findings are not clearly erroneous and should therefore be upheld. *See* Fed.R.Civ.P. 52(a). In its findings, the district court demonstrated how difficult it is for sex offenders to find legal housing in many communities in Iowa due to the housing restriction. It is common that offenders may not return to live in the community they lived in before incarceration, the place where their families live, and/or the place they find work. There are so few legal housing options that many offenders face the choice of living in rural areas or leaving the state. The difficulty in finding proper housing effectively prevents offenders from living in many Iowa communities. This effectively results in banishment from virtually all of Iowa's cities and larger towns.

In *Smith,* the Supreme Court drew a distinction between Alaska's sex offender registry and colonial punishments such as shaming, branding, and banishment. The Court found that the registry merely involved "dissemination of information," whereas the colonial punishments "either held the person up before his fellow citizens for face-to-face shaming or *expelled him from the community.*" *Smith,* 538 U.S. at 98, 123 S.Ct. 1140 (emphasis added). It described the aim of these colonial punishments as making "offenders suffer permanent stigmas, which in effect cast the person out of the community." *Id.* (internal quotation and citation omitted). The residency requirement is a permanent stigma as well as a law that effectively casts the person out of the community. Further, *Smith* also described as banishment situations in which individuals "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." *Id.* Under this phrasing, section 692A.2A fits the description of banishment.

***725** Of course, the residency restriction does not prevent offenders from living in every community, nor from visiting communities in which they are not allowed to live. In this way, the law differs from complete banishment. However, preventing offenders from making a home in many Iowa communities after they have served their sentence does have substantial similarity to banishment. To the extent that offenders are effectively banished from their desired places of residence, I would find this factor weighs in favor of finding section 692A.2A punitive.

2. Does the residency restriction promote traditional aims of punishment?

The residency restriction serves a traditional aim of punishment: deterrence. The majority attempts to minimize the deterrent effect of the statute by arguing that the statute does not increase the negative consequences for an action, but merely reduces the opportunity for that action to occur. In my view, this distinction is not important. One major reason we use the punishments we do, such as imprisonment, is to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes. There is clearly a deterrent purpose at work in section 692A.2A, thus the measure promotes a traditional aim of punishment.

3. Does the residency restriction impose an affirmative disability or restraint?

The majority acknowledges that the residency requirement imposes an affirmative disability or restraint, and I agree. It restricts offenders from living in certain areas. Offenders that live within the restricted areas face criminal penalties. In this way, the restraint differs greatly from the sex offender registry in *Smith.* The Court in that case pointed out that offenders were "free to change ... residences." *Smith,* 538 U.S. at 100, 123 S.Ct. 1140. The Court also noted that there was no evidence that the measure disadvantaged the offenders in finding housing. *Id.* I would find that the affirmative disability or restraint intrinsic in the residence requirement distinguishes it from the sex offender registry in *Smith* and weighs in favor of finding the law punitive.

4. Does the residency restriction have a rational connection to a nonpunitive purpose?

I agree with the majority that section 692A.2A has a rational connection to the nonpunitive purpose of protecting the public. *See In Interest of S.M.M.,* 558 N.W.2d 405, 408 (Iowa 1997).

5. Is the residency restriction excessive?

Though I believe a rational connection exists between the residency restriction and a nonpunitive purpose, I would find that the restriction is excessive in relation to that purpose. The statute limits the housing choices of all offenders identically, regardless of their type of crime, type of victim, or risk of re-offending. The effect of the requirement is quite dramatic: many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area. This leaves offenders to live in the country or in small, prescribed areas of towns and cities that might offer no appropriate, available housing. In addition, there is no time limit to the restrictions.

Also, the residency restriction applies to plaintiffs who are not the most serious sex offenders. There is no doubt a class of offenders that is at risk to re-offend and for whom such a restriction is reasonable. ***726** However, the restriction also applies to John Doe II, who pleaded guilty to third degree sexual abuse for having consensual sex with a fifteen-year-old girl when he was twenty years old. The restriction applies to John Doe VII, who was convicted of statutory rape under Kansas law. His actions which gave rise to this conviction would not have been criminal in Iowa. The restriction applies also to John Doe XIV, who pleaded guilty to a serious misdemeanor charge in 1995 after he exposed himself at a party at which a thirteen-year-old girl was present. John Doe XIV was nineteen at the time of his offense. The actions of these and other plaintiffs are serious, and, at least in most cases, illegal in this state. However, the severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive.

In my view, four factors weigh in favor of finding the statute punitive, while only one weighs in favor of finding the statute nonpunitive. The analysis leads me to the conclusion that the residency restriction is punitive. Because the imposition of the residency requirement " 'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,' " *Stogner*, 539 U.S. at 612, 123 S.Ct. 2446 (quoting *Calder*, 3 U.S. at 390, 3 Dall. 386, 1 L.Ed. 648), I would find Section 692A.2A is an unconstitutional ex post facto law that cannot be applied to persons who committed their offenses before the law was enacted.

405 F.3d 700

Briefs and Other Related Documents **(Back to top)**

- 04-1568 (Docket) (Mar. 10, 2004)
- 2004 WL 2758312 (Appellate Brief) Appellant's Brief and Argument (2004)

END OF DOCUMENT

H

Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.
John DOE, I, John Doe, II, John Doe, III, John Doe, IV, et al., Plaintiffs-Appellants,
v.
James T. MOORE, in his official capacity as Commissioner of the Florida Department of Law Enforcement, Secretary for the Department of Corrections, by serving James Crosby in his official capacity as Secretary of the Florida Department of Corrections, Fred O. Dickinson, III., in his official capacity as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, Edward Bieluch, Sheriff, in his official capacity as Sheriff of Palm Beach County and as class defendant for all other similar local law enforcement officers in the State of Florida, Defendants-Appellees.
No. 04-10279.

June 6, 2005.

Background: Florida sex offenders filed class action challenging constitutionality of Florida's sex offender registration/notification scheme and DNA collection statute. The United States District Court for the Southern District of Florida, No. 02-80934-CV-DTKH, Daniel T.K. Hurley, J., granted the state's motion to dismiss, and sex offenders appealed.

Holdings: The Court of Appeals, Birch, Circuit Judge, held that:
(1) registration/notification scheme of Florida's Sex Offender Act did not violate sex offenders' substantive due process rights;
(2) Florida's various classifications and sub-classifications for sex offender registration were constitutional under the Equal Protection Clause;
(3) Sex Offender Act did not unreasonably burden sex offenders' right to travel; and
(4) claim that Florida Sex Offender Act violated Florida's separation of powers doctrine was barred by Eleventh Amendment; and
(5) DNA collection statute did not give rise to substantive due process rights.
Affirmed.

West Headnotes

[1] Mental Health 469(2)
257Ak469(2) Most Cited Cases
When a person is convicted of kidnapping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, there must be a sexual component shown in addition to the predicate offense before designating that person as a sex offender under Florida law. West's F.S.A. § 943.0435.

[2] Mental Health 469(2)
257Ak469(2) Most Cited Cases
When the crime is kidnapping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, the person is not a sex offender under Florida law if they are the parent of the child. West's F.S.A. § 943.0435(1)(a)(1).

[3] Constitutional Law 252.5
92k252.5 Most Cited Cases
Substantive component of due process protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed; fundamental rights protected by substantive due process are protected from certain state actions regardless of the procedures the state uses. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 252.5
92k252.5 Most Cited Cases
When a state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it under due process clause only when it is narrowly tailored to serve a compelling state interest. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[5] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Rights of Florida sex offenders to refuse registration

of his or her personal information with Florida law enforcement and prevent publication of that information on Florida's Sexual Offender/Predator website were not fundamental constitutional rights for substantive due process purposes. U.S.C.A. Const.Amend. 14; West's F.S.A. § 943.0435.

[6] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[6] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Registration/notification scheme of Florida's Sex Offender Act was rationally related to a legitimate government interest in protecting citizens from criminal activity, and therefore did not violate sex offenders' substantive due process rights. U.S.C.A. Const.Amend. 14; West's F.S.A. § 943.0435.

[7] Constitutional Law 242.1(5)
92k242.1(5) Most Cited Cases
Sex offenders in general were not considered a suspect class for equal protection purposes; nor were sub-classes of sex offenders based on parental relationship to victim, status of offender as a minor, insanity or civil commitment of the offender, and release of offender from supervision prior to enactment of Florida's Sex Offender Act. U.S.C.A. Const.Amend. 14; West's F.S.A. § 943.0435.

[8] Constitutional Law 213.1(2)
92k213.1(2) Most Cited Cases
A statute is considered constitutional under the rational basis test for equal protection violation when there is any reasonably conceivable state of facts that could provide a rational basis for it. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 242.1(5)
92k242.1(5) Most Cited Cases

[9] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Florida's various classifications and sub-classifications for sex offender registration were rationally related to a legitimate governmental purpose and, therefore, were constitutional under the Equal Protection Clause; Sex Offender Act could properly treat sex offenders different from other felons in the length of time they were required to register and the penalties associated with failure to register, and Act could permissibly distinguish crimes committed by the parents of victims, those acquitted by insanity or civilly committed, and those committed by persons 18 years old and younger from sex offenders in general, and could properly exempt sex offenders from registration who had been released from supervision prior to the enactment of the statute. U.S.C.A. Const.Amend. 14; West's F.S.A. § 943.0435.

[10] Constitutional Law 83(4.1)
92k83(4.1) Most Cited Cases
Mere burdens on a person's ability to travel from state to state are not necessarily a violation of their constitutional right to travel.

[11] Constitutional Law 83(4.1)
92k83(4.1) Most Cited Cases
Right to travel protects a person's right to enter and leave another state, the right to be treated fairly when temporarily present in another state, and the right to be treated the same as other citizens of that state when moving there permanently. West's F.S.A. § 943.0435.

[12] Constitutional Law 83(4.1)
92k83(4.1) Most Cited Cases

[12] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Florida Sex Offender Act's requirement that sex offenders notify Florida law enforcement in person when they change permanent or temporary residences did not unreasonably burden their right to travel.

[13] Federal Courts 269
170Bk269 Most Cited Cases
Claim that Florida Sex Offender Act violated Florida's separation of powers doctrine by effectively nullifying prior judicial findings that certain sex offenders were not apt to re-offend or engage in criminal conduct was barred by Eleventh Amendment since review of such claim would directly impact the state. U.S.C.A. Const.Amend. 11.

[14] Federal Courts 269
170Bk269 Most Cited Cases
Eleventh Amendment immunity includes a federal suit against state officials on the basis of state law when the relief sought and ordered has an impact directly on the state itself. U.S.C.A. Const.Amend. 11.

[15] States 191.6(1)
360k191.6(1) Most Cited Cases
A state's waiver of its sovereign immunity must be unequivocally expressed.

[16] Federal Courts 613
170Bk613 Most Cited Cases
Eleventh Amendment jurisdictional questions can be raised for the first time on appeal. U.S.C.A. Const.Amend. 11.

[17] Federal Courts 265
170Bk265 Most Cited Cases
Eleventh Amendment acts as a jurisdictional bar for any such suit against the state, even under supplemental jurisdiction. U.S.C.A. Const.Amend. 11.

[18] Constitutional Law 319.5(1)
92k319.5(1) Most Cited Cases

[18] Searches and Seizures 78
349k78 Most Cited Cases
Florida's DNA collection statute, which required administrative regulations be in place within 180 days of the enactment of a statute requiring such rules, did not give rise to substantive due process rights. U.S.C.A. Const.Amend. 14; West's F.S.A. § 120.54(1)(b).

[19] Constitutional Law 254.1
92k254.1 Most Cited Cases
Implementation of nuanced state administrative laws does not by itself raise a liberty interest for constitutional due process review. U.S.C.A. Const.Amend. 14.

[20] Constitutional Law 252.5
92k252.5 Most Cited Cases
State-created procedural rights that do not guarantee a particular substantive outcome are not protected by due process, even where such procedural rights are mandatory. U.S.C.A. Const.Amend. 14.

***1339** Cindy E. D'Agostino, Law Office of Cindy E. D'Agostino, Barbara Jean Scheffer, Mitchell J. Beers, P.A., Palm Beach Gardens, FL, for Plaintiffs-Appellants.

Jason Vail, Tallahassee, FL, Fred H. Gelston, Fred H. Gelston, P.A., West Palm Beach, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH, KRAVITCH and CUDAHY [FN*], Circuit Judges.

FN* Honorable Richard D. Cudahy, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

BIRCH, Circuit Judge:

In this putative class action, initiated by ten John Does and one Jane Doe (collectively "Appellants") on behalf of themselves and others similarly situated, we determine whether Florida's sex offender registration/notification scheme ("Sex Offender Act") and DNA collection statute ("DNA Statute"), codified in relevant parts at Fla. Stat. § § 943.043, .0435, .325, 944.606, violate the Appellants' constitutional right to due process, equal protection, travel, separation of powers, and freedom from *ex post facto* legislation. The ***1340** district court granted the state's motion to dismiss because the Sex Offender Act and the DNA Statute did not offend any provision of the Constitution. We AFFIRM.

I. BACKGROUND

In response to the 1994 abduction, rape, and murder of a seven-year-old girl, Megan Kanka, by her neighbor, a convicted sex offender, Congress along with all 50 states enacted laws requiring sex offenders to register their residence with local law enforcement. *See Smith v. Doe*, 538 U.S. 84, 89-90, 123 S.Ct. 1140, 1145, 155 L.Ed.2d 164 (2003). Concerned by Megan's murder and the high number of repeat sex offenders, states enacted these laws for the purpose of notifying the public about local sex offenders and to aid law enforcement in identifying and locating potential suspects in local sex-related crimes. *See Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S.Ct. 1160, 1163, 155 L.Ed.2d 98 (2003).

[1][2] The Sex Offender Act requires any sex offender to register with the local sheriff's office within 48 hours of their release from custody or relocation to a permanent or temporary residence in Florida. Fla. Stat. § 943.0435(2). The Sex Offender Act defines a sex offender as a person who "has been [c]onvicted of committing, or attempting, soliciting, or conspiring to commit, any of the [following] criminal offenses ... in this state or similar offenses in another jurisdiction:" kidnapping of a child; false imprisonment of a child under the age of 13; luring or enticing a child under 12 into a structure, dwelling or conveyance for an unlawful purpose; sexual battery; procuring child prostitution; lewd and lascivious offenses committed upon or in the presence of a person under 16; lewd and lascivious

battery, molestation, or conduct; lewd and lascivious offenses committed in the presence of an elderly person, battery, and molestation; promoting a sexual performance by a child; showing obscene material to a minor; possessing child computer pornography; transmitting child pornography; buying or selling a minor with knowledge the minor will be portrayed as engaging or appearing to engage in sex acts. § 943.0435(1)(a)(1). [FN1] Further, anyone moving to Florida who has been convicted of similar crimes or has been designated as a sex offender in another state will also be considered a sex offender in Florida. § 943.0435(1)(a)(2)-(3).

> FN1. When a person is convicted of kidnapping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, there must be a sexual component shown in addition to the predicate offense before designating that person as a sex offender. *See Raines v. State*, 805 So.2d 999, 1003 (Fla.Dist.Ct.App.2001). Moreover, when the crime is kidnapping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, the person is not a sex offender if they are the parent of the child. § 943.0435(1)(a)(1).

Upon registering with the local sheriff's office, a sex offender must provide the following:

> name, date of birth, social security number, race, sex, height, weight, hair and eye color, tattoos or other identifying marks, occupation and place of employment, address of permanent or legal residence or address of any current temporary residence, ... date and place of each conviction, and a brief description of the crime or crimes committed by the offender.

§ 943.0435(2). Within 48 hours of his or her contact with the sheriff's office, the sex offender must "report in person at a driver's license office of the Department of Highway Safety and Motor Vehicles" where he or she must identify themselves as a sex offender, obtain a driver's license or identification card, and submit to a photograph ***1341** and fingerprinting. § 943.0435(3). The Department of Highway Safety and Motor Vehicles ("DHSMV") will then send the photograph and any further information to the Department of Law Enforcement ("DLE") for public notification by publication to, among other things, the internet. § 943.0435(4).

If a sex offender changes residence, he or she must report to the DHSMV within 48 hours to obtain an updated driver's license or identification card. *Id.* When a sex offender moves out of Florida, he or she is required to notify the local sheriff's office 48 hours before leaving and give the address of his or her intended residence out of state. § 943.0435(7).

A sex offender must comply with the registration statutes for life. The sex offender, however, may be relieved of his or her registration obligation if he or she is pardoned or petitions a court 20 years after release from custody or supervision and, among other things, the court finds them to not be "a current or potential threat to public safety." § 943.0435(11).

The DNA Statute requires any person who is convicted of certain crimes and is incarcerated or on supervisory release to submit two blood or tissue samples for DNA testing. § 943.325(1)(a). Results of the testing identifying the person are kept on file with the DLE and used by law enforcement for identification in subsequent crimes. The crimes that currently require DNA collection are sexual battery, lewdness and indecent exposure, murder, aggravated battery, burglary, carjacking, home invasion robbery, robbery, robbery by sudden snatching, aggravated child abuse, aggravated abuse of an elderly or disabled person, and any felony involving the use of a firearm. § 943.325(1)(b). [FN2]

> FN2. Those convicted of any felony offense will be required to submit to DNA testing beginning in July 2005. § 943.325(1)(b)(4).

Here, Appellants allege in their complaint that they are all Florida residents required by Florida law to register as sex offenders and all have their photographs and identifying information posted on Florida's sex offender website. Further, the complaint alleges that five of the Appellants have "been found by their respective trial courts not to be likely to reoffend." Eight were required to submit blood or tissue samples for DNA analysis. Appellants filed their case in the district court seeking relief from the registration requirements. They claimed that the state violated substantive due process by infringing their liberty interest in good reputation, their right to travel, privacy, employment, and freedom of religious association. Further, they claimed the acts are unconstitutional on equal protection grounds because they have greater post-release reporting burdens than other convicted felons. The Appellants also argued that the acts violated the separation of powers doctrine because they nullify judicial sentencing. Finally, they argued that the acts were an unconstitutional impairment of contract

because they altered plea bargains made by sex offenders who were sentenced prior to their enactment.

On 15 December 2003, the district court dismissed all of Appellants' claims. The court held that no fundamental rights protected by the United States Constitution had been affected by the Sex Offender Act, therefore the court would only apply a rational basis test to the substantive due process claims. The court concluded that the Sex Offender Act was rationally related to a legitimate government end. Similarly, the court applied the rational basis test to the equal protection claims of impermissible treatment of those in the sex ***1342** offender classification. The court again concluded that the Sex Offender Act's separate classification did not violate the Constitution. Further, the court dismissed Appellants' claims for separation of powers and impairment of contract, finding no violation of the constitutional provisions. Finally, the court found no constitutional error in Florida's DNA Statute and upheld its validity with little discussion.

II. DISCUSSION

The Appellants appeal arguing that the district court erred when it dismissed their complaint. We review this motion to dismiss order *de novo* and view all factual allegations in the complaint as true and in a light most favorable to the Appellants. *See Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir.2004). In order to succeed on a 42 U.S.C. § 1983 claim, the Appellants must show, among other things, that there was a violation of a right secured by the Constitution or federal law. *See Skinner v. City of Miami*, 62 F.3d 344, 347-48 (11th Cir.1995). Here, they argue that the complaint states a sufficient § 1983 claim that the Sex Offender Act violates their constitutional rights to due process, equal protection, travel and separation of powers, and that the DNA Statute violates their constitutional rights to separation of powers, due process and to be free of ex post facto legislation. We do not agree.

A. Sex Offender Act

1. Due Process Claims

The United States Constitution guarantees that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This provision has been interpreted to have both a procedural and substantive component when reviewing state action. The more common procedural component guarantees that a state will not deprive a person of life, liberty, or property without some form of notice and opportunity to be heard. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2648-49, 159 L.Ed.2d 578 (2004). Here, the Appellants do not directly claim a procedural due process violation and we will not consider one since that path has been foreclosed by the Supreme Court's decision in *Connecticut Department of Public Safety*, where the Court upheld a similar Connecticut sex offender registration statute against claims of procedural due process violations. [FN3] 538 U.S. at 7-8, 123 S.Ct. at 1164-65.

> FN3. Appellants argue that the Sex Offender Act violates substantive due process by creating an irrebuttable presumption of dangerousness. Though they strain to place their argument in terms of substantive due process we find their argument closely resembles the procedural due process argument proposed in *Connecticut Department of Public Safety*, 538 U.S. 1, 6, 123 S.Ct. 1160, 1163, 155 L.Ed.2d 98. There, the sex offenders argued that they have a procedural due process right to demonstrate they are not "currently dangerous" because the sex offender registration requirement implied that they were dangerous. *Id.* Although the Second Circuit Court of Appeals agreed with that argument and held there was a due process violation, the Supreme Court reversed, holding that no liberty interest was implicated because the Connecticut statute turned "on an offender's conviction alone" and dangerousness "is of no consequence under" the law. *Id.* at 6-7, 123 S.Ct. 1160. Similarly, the Sex Offender Act here does not turn on the dangerousness of the offender, merely the fact that he or she was convicted.

[3][4] Instead, the Appellants argue that the Sex Offender Act violates substantive due process. This substantive component protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *See* ****1343**Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.1994) (*en banc*). Fundamental rights protected by substantive due process are protected from certain state actions regardless of the procedures the state uses. *See Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997); *McKinney*, 20 F.3d at 1556. When a

state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993). The Supreme Court has recognized that fundamental rights include those guaranteed by the Bill of Rights as well as certain "liberty" and privacy interests implicit in the due process clause and the penumbra of constitutional rights. *See Glucksberg*, 521 U.S. at 720, 117 S.Ct. at 2267; *Paul v. Davis*, 424 U.S. 693, 712-13, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). These special "liberty" interests include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Glucksberg*, 521 U.S. at 720, 117 S.Ct. at 2267 (citations omitted). The Court, however, is very reluctant to expand substantive due process by recognizing new fundamental rights, explaining:

> we "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Glucksberg, 521 U.S. at 720, 117 S.Ct. at 2267-68 (citations omitted).

We must analyze a substantive due process claim by first crafting a "careful description of the asserted right." *Flores*, 507 U.S. at 302, 113 S.Ct. at 1447; *accord Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. at 2268. Second, we must determine whether the asserted right is "one of 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' " *Williams v. Attorney Gen. of Alabama*, 378 F.3d 1232, 1239 (11th Cir.2004) (quoting *Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. at 2268), *cert. denied, Williams v. King*, --- U.S. ----, 125 S.Ct. 1335, 161 L.Ed.2d 115 (2005).

a. Careful Description

[5] The Appellants appear to make broad claims that the Sex Offender Act infringes their liberty and privacy interests, particularly Appellants assert that the Sex Offender Act infringes their "rights to family association, to be free of threats to their persons and members of their immediate families, to be free of interference with their religious practices, to find and/or keep any housing, and to a fundamental right to find and/or keep any employment." Appellants' Br. at 6 (citations omitted). Despite Appellants' broad framing of their rights in this case, however, we must endeavor to create a more careful description of the asserted right in order to analyze its importance.

Although the Supreme Court has recognized fundamental rights in regard to some special liberty and privacy interests, ***1344** it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection. *See Paul*, 424 U.S. at 713, 96 S.Ct. at 1166 (noting that personal privacy rights protected by substantive due process "must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' "). Further, in order to trigger substantive due process protection the Sex Offender Act must either directly or unduly burden the fundamental rights claimed by Appellants. *See Maher v. Roe*, 432 U.S. 464, 473-74, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484 (1977) (holding that the substantive due process clause "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); *see also Paul P. v. Verniero*, 170 F.3d 396, 405 (3rd Cir.1999) (holding that the indirect effects caused by a sex offender registration statute are "too substantially different from the government actions" in prior case law "to fall within the penumbra of constitutional privacy protection."). Thus, a careful description of the fundamental interest at issue here allows us to narrowly frame the specific facts before us so that we do not stray into broader "constitutional vistas than are called for by the facts of the case at hand." *Williams*, 378 F.3d at 1240. [FN4] To do so we use the Sex Offender Act itself to define the scope of the claimed fundamental right. *Id.* at 1241. After reviewing the provisions of the Sex Offender Act and the briefs, the right at issue here is the right of a person, convicted of "sexual offenses," to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information on Florida's Sexual Offender/Predator website.

FN4. We do not suggest that cases involving other privacy interests or burdens on those

interests are irrelevant to our decision in this case. Rather, we conclude that first we must quantify the claimed right in narrow terms before analyzing its historical importance in the second prong where discussion of prior case law is more appropriate.

b. History and Tradition

With this description, we now ask whether this right is " 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' " *Id.* at 1239. We conclude that it is not.

The circuit courts that have considered this substantive due process argument regarding sex offender registries have upheld such registration and publication requirements finding no constitutional infirmities. *See, e.g., Doe v. Tandeske,* 361 F.3d 594, 597 (9th Cir.2004) (per curiam) ("Persons who have been convicted of serious sex offenses do not have a fundamental right to be free from ... registration and notification requirements ...."); *Gunderson v. Hvass,* 339 F.3d 639, 643 (8th Cir.2003) (sex offender registration statute did not infringe the fundamental right to a presumption of innocence); *Paul P.,* 170 F.3d at 404, 405 (holding that sex offender registration did not infringe fundamental right of family relationships, and although the registration of offenders home address invaded the fundamental right to privacy, the state had a compelling interest to prevent future sex offenses). [FN5] In *Paul P.,* the court held that the indirect effects of members of the public on the offender's relationship with his family did not rise ***1345** to the infringement of a fundamental right by the state. 170 F.3d at 405. As the court conceded, even if the effect of registration places a constitutionally recognizable claim on the offender's family relationships, it did not fall under a fundamental right classification because the sex offender statute did "not restrict plaintiffs' freedom of action with respect to their families and therefore does not intrude upon the aspect of the right to privacy that protects an individual's independence in making certain types of important decisions." *Id.*

FN5. The Eighth Circuit has further held constitutional an Iowa statute banning sex offenders from living within 2000 feet of a school or child care facility, which was argued on similar substantive due process and right to travel grounds. *See generally Doe v. Miller,* 405 F.3d 700 (8th Cir.2005).

Furthermore, in *Paul v. Davis* the Supreme Court determined that there was no fundamental right to prevent the public disclosure of a person's arrest for shoplifting. 424 U.S. at 713, 96 S.Ct. at 1166. In *Paul,* local police departments distributed fliers to area stores alerting them to possible shoplifters during the holiday shopping season. *Id.* at 694-95, 96 S.Ct. at 1157. The fliers contained the mug shot and name of the plaintiff in the case who had been arrested for and charged with shoplifting. *Id.* at 695, 96 S.Ct. at 1158. At the time of the flyer distribution, however, he had not been convicted of the crime, and shortly thereafter the charge was dismissed. *Id.* at 696, 96 S.Ct. at 1158. The Supreme Court refused to extend substantive due process protection to the publication of official acts like arrest records, noting that the right claimed was "far afield" of its previous decisions that limited a state's power to regulate private conduct. *Id.* at 713, 96 S.Ct. at 1166. [FN6]

FN6. The Court noted previous decisions recognized limitations on state regulatory power in areas regarding "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*

Though the Supreme Court has not addressed whether substantive due process invalidates sex offender registration statutes, *see Connecticut Dep't of Public Safety,* 538 U.S. at 8, 123 S.Ct. at 1165, we can find no history or tradition that would elevate the issue here to a fundamental right. In fact, the case law we have found supports the contrary conclusion. We can certainly understand how a person may be shunned by a person or group that discovers his past offense. However, a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy. Therefore, we do not review the statute with strict scrutiny, but only under a rational basis standard.

c. Rational Basis

When a statute does not implicate fundamental rights, we must ask whether it is "rationally related to legitimate government interests." *Glucksberg,* 521 U.S. at 728, 117 S.Ct. at 2271. The rational basis standard is "highly deferential" and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances. *Williams v. Pryor,* 240 F.3d 944, 948 (11th Cir.2001).

[6] Here, the state articulates its reasoning for the

Sex Offender Act as "protect[ing] the public from sexual abuse." Appellee's Br. at 32. The state argues that the public can use the registration "to determine whether any sex offenders live in their neighborhood, make an individual assessment of the risk, and take any precautions appropriate under the circumstances." *Id.* at 33. We agree with the state that the Sex Offender Act meets the rational basis standard. It has long been in the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law. We join with other courts, *see, e.g.,* Gunderson, 339 F.3d at 643-44, in holding that the Sex Offender ***1346** Act is rationally related to a legitimate government interest. Thus, Appellants' substantive due process argument fails.

2. Equal Protection Claim

Group classification by legislative act will be analyzed under a strict scrutiny if the classification infringes fundamental rights or concerns a suspect class. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Because we have found no fundamental rights are at stake or unduly burdened in the preceding section, we must now determine whether the Sex Offender Act involves a suspect class. If not, we review the constitutionality of the classification under a rational basis test. *Id.* at 442, 105 S.Ct. at 3255.

[7] We recognize that the Supreme Court has designated several classifications as suspect and subject to heightened scrutiny under the Equal Protection Clause. They include classifications regarding "race, alienage, national origin, gender, or illegitimacy." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir.1995). Here, Appellants argue that the Sex Offender Act impermissibly treats sex offenders differently from other felony offenders and that it arbitrarily assigns different registration requirements to sub-classes of sex offenders based on parental relationship to victim, status of offender as a minor, insanity or civil commitment of the offender, and release of offender from supervision prior to enactment of the statute. Since sex offenders are not considered a suspect class in general, *see* United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir.2001), and the various sub-classifications presented by the Appellants do not implicate a suspect class, we review those classifications under a rational basis test asking whether they are "rationally related to a legitimate governmental purpose." *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. at 3258.

[8] A statute is considered constitutional under the rational basis test when "there is any reasonably conceivable state of facts that could provide a rational basis for" it. *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993). The Supreme Court in *Beach Communications* noted that:

> Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.
>
> On rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record, has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

Id. at 313-15, 113 S.Ct. at 2101-02 (citations and punctuation omitted). "Almost every statute subject to the very deferential rational basis ... standard is found to ***1347** be constitutional." *Williams*, 240 F.3d at 948.

[9] Based on this standard, we find no constitutional infirmity here. First, Appellants argue that the Sex Offender Act impermissibly treats sex offenders different from other felons in the length of time they are required to register and the penalties associated with failure to register. Appellants' Br. at 33-34. The Sex Offender Act requires a lifetime registration requirement for sex offenders, who may petition a court to avoid registration only after 20 years. *Id.* Conversely, other felons are subjected to only a five-year registration period with automatic removal of that requirement after the five years. *Id.*; Appellee's Br. at 45. The state argues that the purpose of the distinction "is based on an assessment of the likelihood of sex offenders re-offending over time at a high rate." Appellee's Br. at 45. The increased

reporting requirements based on evidence of increased recidivism among a class of felons is rationally related to the state's interest in protecting its citizens from criminal activity. *See Smith*, 538 U.S. at 102, 123 S.Ct. at 1152 (noting that the broad categories of a sex offender registration statute "and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism").

Second, Appellants argue that the Sex Offender Act impermissibly distinguishes crimes committed by the parents of victims-such as kidnaping, false imprisonment, or luring or enticing a child into a dwelling or conveyance-from the same crimes committed by non-parents of the victim. The state argues that the distinction is based on the fact that these crimes committed by parents are typically a result of domestic disputes and exemption of the parents recognizes that fact. We can find no reason why such a designation is not rationally related to the state's interest in protecting the public from sexual abuses, especially when such offenses do not themselves have a sexual component and parents may still have to register as sex offenders if they are convicted of further crimes, such as sexual battery. [FN7]

> FN7. It is also important to note here that Florida case law at least limits application of the Sex Offender Act when a person convicted of these crimes was not also convicted of some sexual component. *Raines*, 805 So.2d at 1003.

Third, Appellants argue that those found not guilty of sex offenses by reason of insanity or those civilly committed that are prone to sexual deviance are not required to register as sex offenders. The state reasons that the insanity classification is rationally related to the legitimate purpose of criminal deterrence. Because a criminally insane or civilly committed offender would not appreciate the deterrent factor, there is no need to require them to register. Further, the state argues that those acquitted by insanity or civilly committed are by definition not convicted of a sex offense under the statute. Considering these stated objectives and the reasoning of other courts that note a state can distinguish between those civilly committed and convicted sex offenders, *see Thielman v. Leean*, 282 F.3d 478, 485 (7th Cir.2002), the insanity classification meets the rational basis test.

Fourth, Appellants argue the Sex Offender Act impermissibly distinguishes between a person 18 years old and younger from those 19 and older by requiring only a ten-year registration period for the younger offenders. *See* § 943.0435(11)(b). The state argues this distinction is based on a finding that minors are "less able to control their behavior than adults, but that they can be expected to gain more self-control and to act responsibly as they mature." Appellee's Br. at 46. Such a distinction ***1348** is supported by the countless criminal laws that distinguish the acts of minors from the acts of adults. The state's objective to focus on a class of offenders that are particularly dangerous or likely more dangerous is rational, and extensive "courtroom factfinding" that questions legislative determinations is not permissible here. *Beach Communications*, 508 U.S. at 315, 113 S.Ct. at 2102.

Fifth, Appellants argue that the state improperly exempted sex offenders from registration who had been released from supervision prior to the enactment of the statute. The state argues that this classification hinged on the expense and futility of attempting to locate and register past sex offenders. Because this class of past offenders have been released from supervision, it would be difficult to locate them and further drain resources dedicated to protecting the public from sex offenders in general. State budget concerns and resource allocation are legitimate government interests, *see Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir.1999) ("Budgetary concerns are a legitimate governmental interest ...."), and reducing extraneous costs that can provide only moderate success in registering past sex offenders is rationally related to that interest. While Appellants may argue that this distinction is unfair, that is not for us to determine once we hold that there is a rational basis for that distinction.

Thus, Florida's various classifications and sub-classifications for sex offender registration are rationally related to a legitimate governmental purpose and, therefore, constitutional under the Equal Protection Clause. We will not substitute our judgment on when and where to make such distinctions for that of the Florida legislature. *See Beach Communications*, 508 U.S. at 316, 113 S.Ct. at 2102 ("Such scope-of-coverage provisions are unavoidable components of most economic or social legislation.").

3. Right to Travel

[10][11] Next, Appellants argue that the Sex Offender Act infringes their fundamental right to travel under the United States Constitution.

However, mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel. *See Saenz v. Roe*, 526 U.S. 489, 499, 119 S.Ct. 1518, 1524, 143 L.Ed.2d 689 (1999) (noting a statute cannot " 'unreasonably burden' " the right to travel). In the predominant case law, the right to travel protects a person's right to enter and leave another state, the right to be treated fairly when temporarily present in another state, and the right to be treated the same as other citizens of that state when moving there permanently. *Id.* at 500, 119 S.Ct. at 1525.

[12] Here, however, the Appellants do not argue that they were treated differently because they were a new or temporary resident to Florida or that they were not allowed to enter and leave another state. Rather, they argue that it is inconvenient to travel from their permanent residence because the Sex Offender Act requires them to notify Florida law enforcement in person when they change permanent or temporary residences. [FN8] Though we recognize this requirement is burdensome, we do not hold it is unreasonable by constitutional standards, especially in light of the reasoning behind such registration. The state has a strong interest in preventing future sexual offenses and alerting local ***1349** law enforcement and citizens to the whereabouts of those that could reoffend. Without such a requirement, sex offenders could legally subvert the purpose of the statute by temporarily traveling to other jurisdictions for long periods of time and committing sex offenses without having to notify law enforcement. The state has drawn a line for temporary and permanent relocation, and we hold this requirement does not unreasonably burden the Appellants' right to travel.

> FN8. Temporary residence includes "a place where the person routinely abides, lodges or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence, including any out-of-state address." Fla. Stat. § 775.21(2)(g).

4. Separation of Powers

[13] Appellants also claim that the Sex Offender Act violates Florida's separation of powers doctrine. They claim that the Sex Offender Act effectively nullifies prior judicial findings that certain Appellants are not apt to re-offend or engage in criminal conduct. Furthermore, they claim the Sex Offender Act undermines judicial sentencing duties. Appellants' claim, however, runs afoul of another important constitutional doctrine-the Eleventh Amendment.

[14][15][16][17] The Eleventh Amendment prevents suits in federal court against an unconsenting state by its citizens or citizens of other states. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). This immunity includes "a federal suit against state officials on the basis of state law ... when ... the relief sought and ordered has an impact directly on the State itself." *Id.* at 117, 104 S.Ct. at 917. Appellants' argue that the state's immunity has been waived because it was not raised as a defense in the district court. A state's waiver of its sovereign immunity, however, must be "unequivocally expressed," *see id.* at 99, 104 S.Ct. at 907, and Eleventh Amendment jurisdictional questions can be raised for the first time on appeal, *see Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (1982). The Eleventh Amendment acts as a jurisdictional bar for any such suit against the state, even under supplemental jurisdiction. *See Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919. Accordingly, we cannot decide an issue of state law that is denied to us by the Constitution and not waived by the state. [FN9]

> FN9. Even if we could assert jurisdiction, Appellants' substantive argument is not compelling. Florida courts and other courts across the country have upheld similar attacks to statutes that label sex offenders or require their registration. *See Kelly v. State*, 795 So.2d 135, 137 (Fla.Dist.Ct.App.2001) (holding that mandatory sexual predator designation did not violate state separation of powers); *see also Herreid v. State*, 69 P.3d 507, 509 (Alaska Ct.App.2003) (holding sex offender registration did not violate separation of powers because requirement was regulatory in nature).

Thus, we find no constitutional defects with Florida's Sex Offender Act. Appellants' arguments that the Sex Offender Act violates the doctrines of due process, equal protection, travel, and separation of powers are not viable in this instance.

B. DNA Statute

[18] Appellants next make a terse argument that Florida's DNA Statute violates the federal and state constitutional doctrines of due process and separation of powers. [FN10] For the reasons that follow, we disagree.

FN10. While Appellants raise the issue that the DNA Statute violates the ex post facto clause of the Constitution, they fail to support their claim with substantive argument. On appeal, we require appellants to not only state their contentions to us, but also to give "the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R.App. P. 28(a)(9)(A). Appellants' cursory restatement of the issues fails to raise the issue sufficiently for discussion here and is deemed abandoned. *See Love v. Deal*, 5 F.3d 1406, 1407 n. 1 (11th Cir.1993).

***1350** 1. Due Process

[19][20] First, Appellants ask us to enforce Fla. Stat. § 120.54(1)(b), which requires administrative regulations be in place within 180 days of the enactment of a statute requiring such rules. While the issue of whether such rules are not in place is in serious doubt, *see* Fla. Admin. Code Ann. r. 11D-6.001, 6.003, the implementation of nuanced state administrative laws does not by itself raise a liberty interest for constitutional due process review. *See Tony L. v. Childers*, 71 F.3d 1182, 1185 (6th Cir.1995). "State-created procedural rights that do not guarantee a particular substantive outcome are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory." *Id.* Section 120.54(1)(b) merely gives direction and procedural deadlines to state agencies; it does not grant substantive rights to the Appellants.

2. Separation of Powers

Second, Appellants assert a separation of powers claim under the Florida constitution because the DNA Statute divested them of their right to challenge the collection and use of a DNA sample. As we stated previously in regard to the Sex Offender Act, however, we will not interpret state law against state officials when such review directly impacts the state. *See Pennhurst*, 465 U.S. at 117, 104 S.Ct. at 917. Thus, Appellants' final argument fails.

III. CONCLUSION

Appellants' challenge to the Florida Sex Offender Act and DNA Statute was dismissed by the district court for failure to raise issues of federal constitutional concern. This appeal alleges that those Florida laws violate due process, equal protection, right to travel, and separation of powers doctrines. As we have explained, the motion to dismiss was correctly granted. Accordingly, the motion to dismiss granted by the district court is AFFIRMED.

410 F.3d 1337, 18 Fla. L. Weekly Fed. C 597

Briefs and Other Related Documents (Back to top)

- 2004 WL 3557192 (Appellate Brief) Appellants' Reply Brief (Jul. 27, 2004)
- 2004 WL 3559243 (Appellate Brief) Brief and Addendum of Plaintiffs Doe (Apr. 29, 2004)
- 04-10279 (Docket) (Jan. 20, 2004)

END OF DOCUMENT

H

Briefs and Other Related Documents

Supreme Court of Florida.
Everett Ward MILKS, Petitioner,
v.
STATE of Florida, Respondent.
State of Florida, Appellant,
v.
Ferman Carlos Espindola, Appellee.
Nos. SC03-1321, SC03-2103.

Feb. 3, 2005.

Background: In two cases, convicted sex offenders were adjudicated sexual predators subject to the registration and notification requirements under the Sexual Predators Act. Both offenders appealed. In *Milks v. State*, 848 So.2d 1167, the Second District Court of Appeal affirmed, but in *Espindola v. State*, 855 So.2d 1281, the Third District Court of Appeal reversed and certified conflict.

Holdings: The Supreme Court, Bell, J., held that:
(1) due process did not require evidentiary hearing to determine whether convicted sex offenders subject to sexual predator classification presented danger to community, and
(2) adjudication as sexual predator subject to Act's requirements based solely on qualifying conviction did not violate separation of powers doctrine.
Decision of Second The District Court of Appeal approved; decision of Third District Court of Appeal reversed.

Anstead, J., filed opinion concurring in part and dissenting in part in which Pariente, C.J., and Quince, J., concurred.

West Headnotes

[1] Constitutional Law 255(5)
92k255(5) Most Cited Cases

[1] Mental Health 469(4)
257Ak469(4) Most Cited Cases
Due process did not require evidentiary hearing to determine whether convicted sex offenders adjudicated sexual predators presented danger to community, under Sexual Predators Act; only fact material to subjecting sex offender to Act's registration and public notification requirements was qualifying conviction. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 9; West's F.S.A. § 775.21.

[2] Constitutional Law 52
92k52 Most Cited Cases

[2] Mental Health 433(2)
257Ak433(2) Most Cited Cases
Sexual predator classification subjecting convicted sex offender to registration and public notification requirements under Sexual Predators Act based solely on qualifying conviction for enumerated sex offense did not violate separation of powers doctrine by allegedly wresting from courts discretion to determine whether offender should be declared sexual predator; rather, Act was permissible exercise of public-policy-making function of legislature. West's F.S.A. § 775.21.

***925** James Marion Moorman, Public Defender and Anthony C. Musto, Special Assistant Public Defender, Tenth Judicial Circuit, Bartow, FL, for Petitioner.

Charles J. Crist, Jr., Attorney General and Christopher M. Kise, Solicitor General, Tallahassee, FL; Robert J. Krauss, Chief Assistant Attorney General and Katherine V. Blanco, Senior Assistant Attorney General, Tampa, FL, for Respondent.

Charles J. Crist, Jr., Attorney General and Christopher M. Kise, Solicitor General, Tallahassee, FL, and Richard L. Polin, Criminal Appeals Bureau Chief, Miami, FL, for Appellant.

Bennett H. Brummer, Public Defender and John Eddy Morrison, Assistant Public Defender, Eleventh Judicial Circuit, Miami, FL, for Appellee.

BELL, J.

We have before us two cases challenging the constitutionality of the Florida Sexual Predators Act, section 775.21, Florida Statutes (2003). In *Milks v. State*, 848 So.2d 1167 (Fla. 2d DCA 2003), the Second District Court of Appeal declared the Act constitutional, rejecting procedural-due-process and separation-of-powers challenges. In *Espindola v.*

State, 855 So.2d 1281 (Fla. 3d DCA 2003), the Third District Court of Appeal declared the Act unconstitutional on procedural-due-process grounds. [FN1] We approve the decision of the Second District in *Milks* and reverse the decision of the Third District in *Espindola*. We hold that the Act does not violate procedural due process or separation of powers and, as against these challenges, is constitutional. We decline at this time to consider the substantive-due-process and equal-protection challenges briefed by the parties but not addressed by the district courts below.

FN1. We have jurisdiction under article V, section 3(b)(1) and (3) of the Florida Constitution.

I. BACKGROUND

The Florida Sexual Predators Act lists certain offenses (and combinations of offenses) and mandates that a person convicted of any such offense be designated a "sexual predator." *See* § 775.21(4)(a)(1), Fla. Stat. (2003) (sexual predator criteria); § 775.21(5), Fla. Stat. (2003) (designation). Once designated as such, a "sexual predator" is subject, among other things, to the Act's registration and public-notification requirements. § 775.21(6), Fla. Stat. (2003) (registration); § 775.21(7), Fla. Stat. (2003) (public notification). The Act neither provides for any predesignation (or preregistration or pre-public-notification) hearing on the issue of an offender's actual dangerousness, nor does it provide the trial court with any discretion on the matter. If a person has been convicted of an enumerated offense, he must be designated by the court as a "sexual predator," and he is automatically subject to the Act's requirements. [FN2]

FN2. The 1995 version of the Act, the first version to include a public-notification provision, did provide for a pre-public-notification "dangerousness" hearing. Before one designated as a "sexual predator" could be subject to the 1995 Act's public-notification requirements, the circuit court would have to determine by a preponderance of the evidence that "the sexual predator poses a threat to the public" and that "notice to the community where the sexual predator temporarily or permanently resides is necessary to protect public safety." § 775.225, Fla. Stat. (1995). The Legislature's 1996 revisions, however, removed the pre-public-notification "dangerousness" hearing and made public notification dependent only on one's designation as a sexual predator, *see* § 775.21(7), Fla. Stat. (Supp.1996), which itself did not require a finding of "dangerousness," only the existence of a qualifying conviction (or combination of convictions).

***926** In *Milks v. State*, 848 So.2d 1167 (Fla. 2d DCA 2003), the Second District declared the Act constitutional. The court rejected Milks' separation-of-powers challenge, citing *Kelly v. State*, 795 So.2d 135 (Fla. 5th DCA 2001) (rejecting separation-of-powers challenge to the Act), and *State v. Cotton*, 769 So.2d 345 (Fla.2000) (rejecting separation-of-powers challenge to the Prison Releasee Reoffender Punishment Act). *See Milks*, 848 So.2d at 1169. The Second District also rejected Milks' procedural-due-process challenge. Citing *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), the court held that "due process did not entitle the defendant to a hearing to establish whether he or she was dangerous, as that fact was not material under the statute." *Milks*, 848 So.2d at 1169.

In *Espindola v. State*, 855 So.2d 1281 (Fla. 3d DCA 2003), the Third District declared the Act unconstitutional on procedural-due-process grounds. "[I]n the absence of a provision allowing for a hearing to determine whether the defendant presents a danger to the public sufficient to require registration and public notification," *id.* at 1290, the Third District held that the Act "fails to provide minimal procedural due process." *Id.* at 1282. Relying on the statement of legislative findings contained in the Act, which state, among other things, that sexual predators "present an extreme threat to the public safety," § 775.21(3)(a), Fla. Stat. (2003), justifying the Act's registration and notification requirements, § 775.21(3)(b), Fla. Stat. (2003), the Third District concluded that "the determination of 'dangerousness' is of import to [the Act]," and, consequently, the Act's "total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses[ ] makes it violative of procedural due process." *Espindola*, 855 So.2d at 1290. Because it concluded that "dangerousness" was a material element under the Act, the Third District held that *Doe* was not controlling. *Id.*

II. DISCUSSION

A. Procedural Due Process

[1] Espindola and Milks argue that the Act violates their rights to procedural due process. *See* U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due

process of law."); art. I, § 9, Fla. Const. ("No person shall be deprived of life, liberty, or property without due process of law...."). This claim is based on the fact that the Act does not provide any procedure for determining in individual cases whether or not a person with an Act-qualifying conviction actually presents a danger to the community that would justify the imposition of the Act's requirements, particularly the Act's registration and public-notification requirements. The United States Supreme Court rejected an identical challenge to Connecticut's sex offender law in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), and we see no reason why the same result is not mandated here.

***927** In *Doe*, the United States Supreme Court considered a procedural-due-process challenge to Connecticut's sex offender law, which "applies to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose." 538 U.S. at 4, 123 S.Ct. 1160. The federal circuit court held that Connecticut's Act "violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be 'currently dangerous.' " *Id.* at 4, 123 S.Ct. 1160 (quoting *Doe v. Department of Public Safety*, 271 F.3d 38, 46 (2d Cir.2001)). The Supreme Court, noting that "Connecticut ... has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness," reversed the circuit court "because due process does not require the opportunity to prove a fact [e.g., current dangerousness] that is not material to the State's statutory scheme." *Doe*, 538 U.S. at 4, 123 S.Ct. 1160. The Court went on to explain that

> the fact that respondent seeks to prove--that he is not currently dangerous-- is of no consequence under Connecticut's Megan's Law.... [T]he law's requirements turn on an offender's conviction alone--a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant to the disclosure of registrants' information....
>
> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders--currently dangerous or not--must be publicly disclosed.... [A]ny hearing on current dangerousness [would be] a bootless exercise.

Id. at 7-8, 123 S.Ct. 1160 (citations omitted).

The same analysis applies here. [FN3] Just as the Connecticut Legislature did, the Florida Legislature has decided that the Act's designation, registration, and public-notification requirements, as well as the Act's other provisions, such as its employment restrictions, "shall be based on the fact of previous conviction, not the fact of current dangerousness." *Id.* at 4, 123 S.Ct. 1160. [FN4] To provide Espindola and Milks with hearings at which they could contest the fact of current dangerousness would be pointless. Even if they could ***928** prove that they present absolutely no threat to the public safety, the Act would still require that they be designated as "sexual predators," that they register, and that the public be notified. As the Court held in *Doe*, "due process does not require the opportunity to prove a fact [here, that one is not dangerous] that is not material to the State's statutory scheme." 538 U.S. at 4, 123 S.Ct. 1160. [FN5] The only material fact under Florida's statutory scheme, just as under Connecticut's, is the fact of a previous conviction--all of the burdens imposed by the Act, from the designation as a "sexual predator" to the registration and public-notification requirements to the employment restrictions, flow from the fact of a previous conviction--and both Espindola and Milks received "a procedurally safeguarded opportunity" to contest that fact. *Id.* at 7, 123 S.Ct. 1160. That is all that procedural due process requires. [FN6]

> FN3. In *Doe*, the Court assumed (without deciding) that the Connecticut Act implicated constitutionally protected liberty interests. 538 U.S. at 7, 123 S.Ct. 1160. The question of procedural due process (or, for that matter, substantive due process) does not arise, of course, unless governmental action implicates a constitutionally protected interest. But the Court found it unnecessary to decide whether the Act implicated constitutionally protected liberty interests because even assuming that it did, the Act provided constitutionally adequate procedures. *Id.* Although it is also unnecessary for us to decide the issue, for the same reasons the Court in *Doe* found it unnecessary, we have in fact already held that the Florida Sexual Predators Act implicates constitutionally protected liberty interests. In *State v. Robinson*, 873 So.2d 1205 (Fla.2004), we applied the so-called "stigma-plus" test of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), and held that the Act implicates the constitutionally protected liberty interest in one's reputation. *Robinson*, 873 So.2d at

1213-14. The only question, therefore, is whether the Act provides constitutionally adequate procedures before depriving a person of this constitutionally protected interest. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). As we will explain below, the answer to this question is "yes, it does."

FN4. *See supra* note 2 (noting that the 1996 version of the Act removed the pre-public-notification "dangerousness" hearing and made public notification, as well as designation and registration, dependent only on the fact of a previous conviction). The Third District attempted to distinguish Florida's Act from Connecticut's, and thereby take Florida's Act outside the scope of *Doe*, by emphasizing the express legislative findings contained in Florida's Act. The Florida Legislature found, among other things, that sexual predators "present an extreme threat to the public safety," § 775.21(3)(a), Fla. Stat. (2003), and that this threat justified the Act's registration and public-notification requirements. § 775.21(3)(b), Fla. Stat. (2003). The Third District is simply incorrect in concluding that these legislative findings make "dangerousness" a material fact under the Act. The Act's substantive provisions clearly make the Act's requirements turn only on the fact of previous conviction, not the fact of dangerousness. In fact, the 1996 version of the Act *eliminated* the pre-public-notification "dangerousness" hearing and made the public-notification provision apply automatically upon designation and registration, which themselves applied automatically upon the fact of previous conviction. *See Robinson*, 873 So.2d at 1212 ("Under the Act, the *sole* criterion for determining whether a defendant must be designated a 'sexual predator' is whether the defendant was convicted of a qualifying offense."). The legislative findings on which the Third District relied do not make any of the Act's provisions turn on a finding of dangerousness. Quite to the contrary, those findings serve as the Legislature's asserted justification for *not* requiring individualized findings of dangerousness before applying the Act's provisions, that is, for treating as a class those convicted of certain crimes and applying the Act's requirements to them all.

FN5. Whether the statutory scheme *must* make "dangerousness" a material factor (before the State may apply any or all of the Act's provisions, or, as the dissent suggests, before the State may designate a person as a "sexual *predator* " rather than merely a "sexual offender") is a question of *substantive* due process. The substantive-due-process issue and possible equal-protection issues were not addressed by either district court below, and for this reason we do not consider them here. We express no opinion as to the merits of any of these possible claims.

FN6. The dissent attempts to distinguish Florida's Act from Connecticut's, and thereby take Florida's Act outside the scope of *Doe*, by noting that Florida's Act designates a person convicted of an Act-qualifying crime as a "sexual predator," whereas Connecticut's Act employs the term "sexual offender." But in the context of our procedural-due-process analysis, this distinction is immaterial. (We express no opinion as to whether this creates a substantive due process problem. *See supra* note 5.) Regardless of the term employed, the requirements that one be designated as such, and then subject to registration and public notification, implicate the constitutionally protected interest in one's reputation. We do not think the dissent is suggesting that no due process protections would apply if the Act simply used the term "offender" rather than "predator." So the question, either way, is whether the person (whether he be designated a "sexual predator" or a "sexual offender") has been afforded a constitutionally safeguarded opportunity to the contest the facts which the State must prove before depriving him of his liberty interest in his reputation. Because all the State must prove under the Act is whether the person has been convicted of an Act-qualifying offense, both Espindola and Milks have been afforded constitutionally adequate procedures.

B. Separation of Powers

[2] The Act vests no discretion in the trial courts with respect to determining ***929** whether the Act

should apply to a particular qualifying offender. *See* § 775.21(4)(a)(1), Fla. Stat. (2003); *Robinson*, 873 So.2d at 1212 ("Under the Act, the *sole* criterion for determining whether a defendant must be designated a 'sexual predator' is whether the defendant was convicted of a qualifying offense."). Espindola and Milks argue that this lack of discretion renders the Act violative of the Florida Constitution's separation-of-powers provision. They rely on Judge Padavano's concurring opinion in *State v. Curtin*, 764 So.2d 645 (Fla. 1st DCA 2000), where he suggested the possible constitutional infirmity because the statute "appears to 'wrest from [the] courts the final discretion' to decide whether an offender should be declared a sexual predator." *Id.* at 648 (Padavano, J., concurring) (alteration in original) (quoting *State v. Benitez*, 395 So.2d 514, 519 (Fla.1981)).

We reject this argument. Although it is argued that the Act "wrest[s] from [the] courts the final discretion to decide whether an offender should be declared a sexual predator," *Curtin*, 764 So.2d at 648 (Padavano, J., concurring) (internal quotation marks omitted), this is not a constitutional infirmity. The Act is an exercise of the public-policy-making function of the Legislature to declare that persons who have been convicted of certain offenses should be designated as "sexual predators" and should be subjected to the registration, public-notification, and other requirements of the Act. It seems apparent that the real objection to the Act is that it "creates an inflexible rule that will stigmatize some offenders who are not within the three distinct classes of offenders the Legislature targeted in section 775.21(3)(a)." *Id.* The Act's inflexibility might well be a shortcoming, but it is not a separation-of-powers problem.

III. CONCLUSION

For the reasons expressed above, we approve the decision of the Second District in *Milks* and reverse the decision of the Third District in *Espindola*.

It is so ordered.

WELLS, LEWIS, and CANTERO, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which PARIENTE, C.J., and QUINCE, J., concur.

ANSTEAD, J., concurring in part and dissenting in part.

I cannot agree with the majority that the Third District in *Espindola* has erroneously misconstrued the provisions of Florida's Sexual Predator Act in distinguishing Florida's Act from the Connecticut Sexual Offender Registration Act approved by the U.S. Supreme Court in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

What the majority fails to confront are not only the express legislative findings contained in Florida's Act concerning future dangerousness, but more importantly, the Act's explicit adoption of the term "sexual predator" rather than "sexual offender" in its registration scheme. It is one thing to provide the public with public information about sexual offenders, but quite another to tell the public that the State has determined that certain persons are "sexual predators." It is pure sophistry to suggest that these actions are the same. [FN7]

> FN7. The majority also fails to set out the facts in *Espindola*. Those facts clearly demonstrate a substantial issue as to whether Espindola should be classified as a "sexual predator."

***930** Obviously, no one's popularity is going to be enhanced by having his or her name appear on a list of sexual offenders. But, as the U.S. Supreme Court has noted in *Doe*, that listing simply comes with having been convicted of a sexual offense. While it is true that many will conclude that any person convicted of a sexual offense will *always* be dangerous, that will be an individual determination based on accurate information. For that reason, I agree with the majority and the U.S. Supreme Court in *Doe* that states have broad authority to provide this information to the public. That is what Connecticut did, and the U.S. Supreme Court correctly approved that action.

However, it is a far different matter when the State decides to classify certain individuals as "sexual predators" and to disseminate information about those "predators" to the public. Under such a scheme, no individual determination of dangerousness need be made because the State has already done that for us. And, of course, no one would challenge the State's determination of "predator" status. The public has a right to rely on the accuracy of that determination and will do so. No reasonable person would take the chance not to rely on such determination. It is in making this irrefutable conclusion that someone is a "sexual predator" without affording that someone an opportunity to

object that Florida's Act runs afoul of constitutional due process protections.

As noted above, unlike the sex offender registration laws in some other states, Florida's Act designates offenders not merely as "sex offenders," but as "sexual predators." Common sense tells us that there is a clear difference between an "offender" and a "predator." For example, *Merriam-Webster's Collegiate Dictionary,* 917 (10th ed.1994), defines "predator" as "one that preys, destroys, or devours." Other reliable authorities contain similar definitions. Accordingly, by notifying the public as to the presence of "sexual predators," Florida's Act goes well beyond merely listing persons who have previously been convicted of a sex offense. In actual effect, by designating these offenders as "sexual predators," the State is clearly stating that the predator is dangerous and the public should beware.

Due Process

The United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In examining a procedural due process claim, a court first must determine whether a State action impacts a citizen's liberty or property interest, and second, whether the procedures provided by the State to challenge that action are adequate. *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

For example, Espindola contends that the Florida Sexual Predators Act interferes with his constitutionally protected liberty interests in reputation. He claims that the Act, by publicly designating him as a "sexual predator," injures his reputation and defames him. To determine whether his interests rise to the level of constitutionally protected liberty interests, the U.S. Supreme Court has ruled that we must apply the so-called "stigma-plus" test, which requires a showing not only of governmental action sufficiently derogatory to injure a person's reputation (i.e., "stigma") but also some tangible and material state-imposed burden or alteration of the individual's legal status. *See Paul v. Davis,* 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding that "reputation ***931** alone, apart from some more tangible interests ... is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").

In *State v. Robinson,* 873 So.2d 1205 (Fla.2004), this Court has already applied the "stigma-plus" test to the Florida Sexual Predators Act, found that the Act did implicate a constitutionally protected liberty interest in reputation, and found the Act unconstitutional as applied. *Robinson,* 873 So.2d at 1214 ("We ... hold that the designation as a sexual predator constitutes a deprivation of a protected liberty interest."). [FN8] We concluded that being "designat[ed] as a 'sexual predator' certainly constitutes a stigma. No one can deny that such a designation affects one's good name and reputation." *Robinson,* 873 So.2d at 1213 (footnote omitted). [FN9]

FN8. In *Robinson,* this Court held that application of the Act to a person convicted of a crime that concededly involved no sexual component violated substantive due process. 873 So.2d at 1217.

FN9. *See also Fullmer v. Michigan Dep't of State Police,* 207 F.Supp.2d 650, 659 (E.D.Mich.2002) (plaintiff met first prong of "stigma plus" due to stigma associated with being falsely labeled as a danger to the community when registry included both currently dangerous offenders and those who are not likely to become dangerous again); *Doe # 1 v. Williams,* 167 F.Supp.2d 45, 51 (D.D.C.2001) ("It is beyond dispute that public notification pursuant to the [District of Columbia sex offender law] results in stigma."); *Doe v. Pryor,* 61 F.Supp.2d 1224, 1231 (M.D.Ala.1999) ("While it might seem that a convicted felon could have little left of his good name, community notification ... will inflict a greater stigma than would result from conviction alone" because "[n]otification will clearly brand the plaintiff as a 'criminal sex offender' ... a 'badge of infamy' that ... strongly implies that he is a likely recidivist and a danger to his community."); *Doe v. Pataki,* 3 F.Supp.2d 456, 468 (S.D.N.Y.1998) (because information required by the New York State Sex Offender Registration Act "is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences ... there is no genuine dispute that the dissemination of the information contemplated by the Act to the community at large is potentially harmful to plaintiffs' personal reputations.").

In *Robinson,* we also held that some harm beyond reputational stigma alone must be demonstrated to invoke procedural due process concerns. *See Robinson,* 873 So.2d at 1213. "[T]o establish [a] depriv[ation] of a liberty interest in reputation sufficient to implicate the procedural protection of the due process clause, [one] must show stigma plus the alteration or extinguishment of some other right or status." *Doe v. Pryor,* 61 F.Supp.2d 1224, 1231 (M.D.Ala.1999); *see also Doe v. Dep't of Pub. Safety,* 271 F.3d 38, 56 (2d Cir.2001) ("[One] establishes a 'plus' factor for purposes of the *Paul v. Davis* 'stigma plus' test only if he or she points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional ... defamation suit."), *rev'd on other grounds, Connecticut Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). Again, however, we have already answered this question in the affirmative in *Robinson* where, after finding that Florida's Act imposed a stigma on those designated as "sexual predators," the Court held that the Act also created three plus factors--i.e., "additional limitations [that] implicate more than merely a stigma to one's reputation," 873 So.2d at 1214:

> We believe the Act imposes more than a stigma.... [U]nder the Act, a person designated a sexual predator is subject to life-long registration requirements. *See* § 775.21(5), Fla. Stat. (Supp.1998). ***932** Further, as another court has noted, "[t]hese statutes create no mere informational reporting requirement, the violation of which is punished with a small fine." *Giorgetti v. State,* 821 So.2d 417, 422 (Fla. 4th DCA 2002), *approved,* 868 So.2d 512 (Fla.2004). To the contrary, the failure of a designated sexual offender to comply with these and other requirements of the Act constitutes a third-degree felony. § 775.21(10). Moreover, a designated sexual predator is prohibited from seeking certain tort remedies, *see* § 775.21(9), and from working "where children regularly congregate." § 775.21(10)(b).

Robinson, 873 So.2d at 1213. [FN10]

> FN10. *See also Doe v. Dep't of Pub. Safety,* 271 F.3d 38, 56-57 (2d Cir.2001) (holding that the "extensive and onerous" registration requirements imposed by Connecticut's sex offender law "constitute a 'plus' factor" because "[t]hose obligations (1) alter [one's] legal status and (2) are 'governmental in nature' insofar as they could not be imposed by a private actor ... and therefore differentiate the plaintiff's complaint from a traditional defamation claim"), *rev'd on other grounds, Connecticut Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003); *Doe v. Pryor,* 61 F.Supp.2d 1224, 1231-32 (M.D.Ala.1999) ("[Alabama's] Community Notification Act deprives the plaintiff of rights previously held under State law. By virtue of having been deemed a 'criminal sex offender' within the meaning of the Act, the plaintiff no longer has the right to establish a new residence without giving prior notice to government officials. He no longer has the right to live and work within 1,000 feet of a school or childcare facility.... These additional deprivations therefore suffice to establish the 'plus' part of the stigma-plus test.") (citations omitted); *Doe v. Pataki,* 3 F.Supp.2d 456, 468 (S.D.N.Y.1998) ("[T]he registration provisions of the Act place a 'tangible burden' on plaintiffs, potentially for the rest of their lives.... In light of these requirements placed on registrants, there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act for a minimum of ten years and, for some, permanently. These requirements obviously encroach on the liberty of convicted sex offenders, and, therefore, they suffer a tangible impairment of a right in addition to mere harm to reputation.").

Since *Robinson* has established that Florida's Act implicates constitutionally protected liberty interests, the question then becomes whether the state procedures for protecting those rights are constitutionally sufficient. *Kentucky Dep't of Corrections,* 490 U.S. at 460, 109 S.Ct. 1904. Espindola contends, and the Third District in *Espindola* concluded, that the Act's failure to provide *any* procedure to contest the designation of someone as a "sexual predator" violates the right to procedural due process. *See Espindola,* 855 So.2d at 1290 ("[The] total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses makes it violative of procedural due process and therefore unconstitutional.").

In *Doe,* the United States Supreme Court considered a similar procedural due process challenge to Connecticut's sex offender law. Importantly, the Connecticut Act simply requires the registration of certain sex offenders *without* designating them as

"sexual predators." The Supreme Court upheld the Connecticut Act and distinguished its provisions from other cases where the Court had held that due process requires a hearing before some specific classification or designation is made. The Court noted that "Connecticut ... has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness.... We therefore reverse the judgment of the Court of Appeals because due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Doe*, 538 U.S. at 4, 123 S.Ct. 1160.

***933** However, as the Third District in *Espindola* has explicitly noted, *Doe* is not controlling here because Connecticut's Act differs from Florida's in that Connecticut's "makes no determination that an offender is dangerous, [while Florida's] *specifically* provides that sexual predators 'present an extreme threat to the public safety.' " *Espindola*, 855 So.2d at 1290 (quoting § 775.21(3)(a), Fla. Stat. (1999)). Therefore, the Third District held that "the determination of 'dangerousness' is of import to [the Florida Sexual Predators Act], and ... the State's reliance on [*Doe*] is misplaced." *Id.* In other words, Connecticut's Act simply designates offenders to be what they obviously are, "sexual offenders," while Florida's Act goes further and designates those offenders as "sexual predators," a designation that may or may not be warranted, depending on the circumstances of each designation.

Conclusion

Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions. That is not a problem. However, unlike Connecticut, Florida has not stopped there. Rather, Florida has gone further and decided it would also classify such persons as "sexual predators." It is this additional classification that invokes due process concerns. Under *Robinson*, Espindola and Milks have demonstrated that the Florida Sexual Predators Act implicates their constitutionally protected liberty interests, triggering due process protections. Further, because Florida's Act automatically designates them as "sexual predators," they must be provided with a fair opportunity to contest that fact, if we are to honor the principles of procedural due process guaranteed by the United States Constitution.

Finally, because I conclude that the flaw in Florida's statutory scheme is the use of the word "predator," I would accept the State's invitation to excise the word "predator" from Florida's sexual offender registration scheme and uphold the Act as excised. [FN11] However, if we do not take this ***934** action, I would affirm the holding in *Espindola* that the Act violates the defendants' rights to due process in not allowing them to contest being classified as a "predator."

FN11. On this point I agree with the opinion of Judge Cope in the Third District:

I agree with the majority opinion that the use of the term "predator" renders the statute constitutionally infirm. In this respect, the Florida statute differs from the statutes construed by the United States Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), and *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

I disagree with the majority on the remedy. In my view, it is possible to sever the unconstitutional portion of the statute from the remainder.

The Florida Supreme Court has said:

In resolving the issue of severability, this Court has consistently applied the tests set forth in *Cramp v. Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla.1962):

When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Smith v. Department of Insurance, 507 So.2d 1080, 1089-90 (Fla.1987) (citations omitted).

"The *Cramp* test is a well established component of Florida law. It has been applied repeatedly in countless Florida cases...." *Schmitt v. State*, 590 So.2d 404, 415 (Fla.1991) (citation and footnote omitted).

Further:

[S]everability does not always depend on the

inclusion of a severability clause in a legislative enactment. Such a clause only buttresses the case for severability. If the four parts of the *Cramp* test are met, severability can occur whether or not the enactment contains a severability clause. *Schmitt*, 590 So.2d at 415 n. 12.

Looking at the statute as a whole, the statute accomplishes the following main objectives:

(a) Registration of offenders;

(b) Disclosure of an offender's location and prior criminal record on the Florida Department of Law Enforcement website and through community notification; and

(c) Labeling certain offenders as "predators." Item (c) is constitutionally infirm, but items (a) and (b) are valid.

Under the *Cramp* test, the first question is whether the unconstitutional provisions can be separated from the remaining valid provisions. *Cramp*, 137 So.2d at 830. The answer is yes. The website contains a listing of sex offenders under Florida's various statutes on the subject. *See* § § 775.21, 943.0435, 944.607, Fla. Stat. All criminal history information is reported in the same format, with the exception that those who qualify as predators under section 775.21 carry the designation "predator" in red letters on the summary page listing the various offenders. The term appears again on the individual history page. The term "predator" can be excised while leaving the remaining information about the offender and his criminal record intact. The website and other public notification materials can substitute a neutral term, such as "sexual offender," or "criminal history information," in place of the stricken term.

Similarly, the statute contains regulations for the registration of offenders who meet the statutory criteria. *See* § 775.21(6), Fla. Stat. The registration requirements remain enforceable. In entering an adjudication under this statute, the court should simply adjudicate that the offender qualifies under section 775.21, Florida Statutes, rather than adjudicating the offender to be a "sexual predator."

The second question under *Cramp* is whether the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void. 137 So.2d at 830. Again, the answer is yes. The thrust of the statute is to require offender registration and to make offender criminal record information available to the public through the internet and otherwise. These purposes can be accomplished even if the "predator" label is stricken.

The third question under *Cramp* is whether the good and bad features are not so inseparable in substance that it can be said the Legislature would have passed the one without the other. 137 So.2d at 830. There is no doubt that the Legislature would have passed this statute regardless of whether the term "predator" was included.

The fourth question under *Cramp* is whether an act complete in itself remains after the invalid provisions are stricken. Again, the answer is yes. The statute adequately defines who is covered, what registration procedures must be followed, and what mechanism is created for public disclosure. The only modification relates to the use of the term "predator."

The State argues that the statute should be upheld in its entirety under *Smith v. Doe* and *Connecticut Department of Public Safety v. Doe*, but the State is incorrect. The Alaska and Connecticut statutes at issue in those cases did not use the term "predator" or any other terminology suggesting that the offender is a present danger to the public.

I would urge the Florida Legislature to revisit the statute at its earliest opportunity. By adjusting the terminology, the constitutional defect in this statute can be corrected and the statute brought into compliance with *Smith v. Doe* and *Connecticut Department of Public Safety v. Doe*.

Espindola v. State, 855 So.2d 1281, 1291-92 (Fla. 3d DCA 2003) (Cope, J., concurring in part and dissenting in part).

894 So.2d 924, 30 Fla. L. Weekly S55

Briefs and Other Related Documents **(Back to top)**

• 2003 WL 23306523 (Appellate Petition, Motion and Filing) Amended Jurisdictional Brief of Respondent (Sep. 2003)

END OF DOCUMENT

House Judiciary staff modified excerpt from "Guidelines to Florida Sex Offender Laws," prepared by the Florida Department of Law Enforcement

SEXUAL OFFENDER RELATED STATUTES

The below chart lists primary Florida statutes for designation, registration, and notification requirements relating to sexual offenders.

775.21(5)(d); 943.0435(1)(a)3.	Offenders designated as sexual offenders in another state or jurisdiction
775.24	Restrictions on court entering certain types of orders and method to address improper orders, etc.
775.25	Counties where sex offenders who violate certain registration statutes can be prosecuted
943.043	FDLE Internet site, toll-free number, public access to public records, and immunity clause
943.0435	Primary section for sexual offender definition, designation and registration requirements for qualifying offenders who are **not** under the care, custody, control, or supervision of the Florida Department of Corrections; immunity clause
944.606	Sexual offender definition and requirements of the Florida Department of Corrections to provide information on sexual offenders who are being released from incarceration for any offense; immunity clause
944.607	Primary section for sexual offender definitions, designation, registration, and notification requirements for qualifying offenders who are in the custody or control of, or under the supervision of the Florida Department of Corrections; in the custody of a private correctional facility or a local jail; or under federal supervision; immunity clause; clerks of court obligations
948.03	Terms and conditions of probation or community control
948.30	Additional terms and conditions of probation or community control for certain sex offenses; includes mandatory conditions for ***specific*** sex offenders/ predators, including restrictions on residency and specific activities

SEXUAL OFFENDERS

CAUTION: **Under Florida law, not all "sex offenders" are "sexual predators". A court must make a specific finding that an offender is a sexual *predator* before that offender can be officially designated as a sexual *predator* and be subject to Florida's sexual *predator* registration and notification requirements.**

What Constitutes a Sexual Offender?

There are several ways a person can be qualified and designated as a "sexual offender" in the state of Florida and, therefore, be required to comply with Florida's sexual offender registration laws:

1. Be convicted of committing, or attempting, soliciting, or conspiring to commit, any of the specified crimes below in this state or of similar offenses in another jurisdiction (or any similar offense committed in this state which has been redesignated from a former statute number to the one specified);

AND

   a. Be in the custody or control of, or under the supervision of, the Florida Department of Corrections, or be in the custody of a private correctional facility, on or after October 1, 1997, as a result of the above conviction(s);

OR

   b. On or after October 1, 1997, be released or have been released from the sanction(s) imposed for the above conviction(s). *("Sanction" is defined below.)*;

OR

2. Establish or maintain a residence in this state and have not been designated as a sexual predator by a court of this state but have been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and as a result of such designation, are subjected to registration or community or public notification, or both, or would be if a resident of that state or jurisdiction;

OR

3. Establish or maintain a residence in this state and be in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the specified criminal offenses listed below (or any similar offense committed in this state which has been re-designated from a former statute number to the one specified).
   {Sections 943.0435(1)(a); 944.606(1)(b); 944.607 (1)(a)}

What are the Qualifying Offenses for Sexual Offender Designation?

Commission of OR Attempt, Solicit, or Conspire to Commit	**s. 787.01***	Kidnapping ***Where the victim is a minor and the defendant is not the victim's parent***
	s. 787.02*	False imprisonment ***Where the victim is a minor and the defendant is not the victim's parent***
	s. 787.025	Luring or enticing a child ***Where the victim is a minor and the defendant is not the victim's parent***
	Chapter 794*	Sexual Battery ****Excluding subsections 794.011(10) and 794.0235***
	s. 796.03	Procuring a person under the age of 18 for prostitution
	s. 800.04	Lewd/lascivious offenses committed upon or in the presence of persons less than 16 years of age
	s. 825.1025	Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult
	s. 827.071	Sexual performance by a child
	s. 847.0133	Protection of minors; prohibition of certain acts in connection with obscenity
	s. 847.0135	Computer pornography
	s. 847.0137	Transmission of child pornography by electronic device/equipment
	s. 847.0138	Transmission of material harmful to minors to a minor by electronic device/equipment
	s. 847.0145	Selling or buying of minors (for portrayal in a visual depiction engaging in sexually explicit conduct)
***Or* A violation of a similar law of another jurisdiction**		

****NOTE: Before using a Kidnapping or False Imprisonment conviction to determine if an offender is a "sexual offender", please check the current case law in Florida for applicable interpretation and application of these convictions.***

SEXUAL PREDATORS

What are the Qualifying Offenses for Sexual Predator Designation?

"ONE IS ENOUGH"

A sexual predator is an offender who has received a **conviction** for an offense listed below that was **committed ON or AFTER October 1, 1993.** Such offender must be designated as a sexual predator by a **court finding**. *{Section 775.21(4)(a), (c), and (5)}*

Capital, Life, First- Degree Felony Violation *or* Any Attempt thereof	**s. 787.01***	Kidnapping ***Where the victim is a minor and the defendant is not the victim's parent***
	s. 787.02*	False imprisonment ***Where the victim is a minor and the defendant is not the victim's parent***
	Chapter 794	Sexual Battery
	s. 800.04	Lewd/lascivious offenses committed upon or in the presence of persons less than 16 years of age
	s. 847.0145	Selling or buying of minors for portrayal in a visual depiction engaging in sexually explicit conduct
Or Any violation of a similar law of another jurisdiction		

NOTE: Before using a Kidnapping or False Imprisonment conviction to determine if an offender is a "sexual predator," please check the current case law in Florida for applicable interpretation and application of these convictions.

Provided that:

- The offender has not received a pardon for any felony or similar law of another jurisdiction that is a qualifying offense; *{Section 775.21(4)(a)2.}*

AND

- A conviction of a felony or similar law of another jurisdiction that is a qualifying offense has not been set-aside in any post conviction proceeding. *{Section 775.21(4)(a)3}*

AND

- In order to be counted as a prior felony for purposes of this subsection, the felony must have resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony. If the offender's prior enumerated felony was committed more than 10 years before the primary offense, it shall not be considered a prior felony under this subsection if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later. *{Section 775.21(4)(b)}*

"SECOND STRIKE"

A sexual predator is an offender who has received a **conviction** for an offense listed below that was **committed ON or AFTER October 1, 1993.** ** Such offender must be designated as a sexual predator by a **court finding**. *{Section 775.21(4)(a)-(c), (5)}*

Any Felony violation OR Any Attempt thereof	**s. 787.01***	Kidnapping ***Where the victim is a minor and the defendant is not the victim's parent***
	s. 787.02*	False imprisonment ***Where the victim is a minor and the defendant is not the victim's parent***
	s. 787.025	Luring or enticing a child ***Where the victim is a minor and t defendant is not the victim's parent***
	Chapter 794*	Sexual Battery ****Excluding subsections 794.011(10) and 794.0235***
	s. 796.03	Procuring a person under the age of 18 for prostitution
	s. 800.04	Lewd/lascivious offenses committed upon or in the presence of persons less than 16 years of age
	s.825.1025 (2)(b)	Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult
	s. 827.071	Sexual performance by a child
	s. 847.0145	Selling or buying of minors (for portrayal in a visual depiction engaging in sexually explicit conduct)
Or A violation of a similar law of another jurisdiction		

NOTE: Before using a Kidnapping or False Imprisonment conviction to determine if an offender is a "sexual predator", please check the current case law in Florida for applicable interpretation and application of these convictions.

AND

The offender has ***previously*** been convicted of or found to have committed or has pled nolo contendere or guilty to, regardless of adjudication, any violation of the below listed offenses.

{Section 775.21(4)(a)1.b.}

787.01*	Kidnapping. *Where the victim is a minor and the defendant is not the victim's parent*
787.02*	False imprisonment. *Where the victim is a minor and the defendant is not the victim's parent*
787.025	Luring or enticing a child. ***Where the victim is a minor and the defendant is not the victim's parent***
794.011 (3)	Sexual battery upon person 12 or older with threats of deadly weapon or physical force
794.011 (4)	Sexual battery on 12 year old or older (various circumstances)
794.011 (5)	Sexual battery upon 12 year old or older without physical force and violence
794.011 (8)	Solicit or engage in sexual battery by person in familial or custodial authority on a person under 18
794.05	Unlawful sexual activity with certain minors
796.03	Procuring person under age of 18 for prostitution
800.04	Lewd, lascivious, offenses committed upon or in the presence of persons less than 16 years of age
825.1025	Lewd, lascivious, offenses committed upon or in the presence of an elderly person or disabled adult.
827.071	Sexual performance by a child
847.0133	Protection of minors; prohibition of certain acts in connection with obscenity
847.0135	Computer pornography
847.0145	Selling or buying of minors (for portrayal in a visual depiction engaging in sexually explicit conduct)
Or A violation of a similar law of another jurisdiction	

NOTE: Before using a Kidnapping or False Imprisonment conviction to determine if an offender is a "sexual predator", please check the current case law in Florida for applicable interpretation and application of these convictions.

Provided that:

- The offender has not received a pardon for any felony or similar law of another jurisdiction that is a qualifying offense; *{Section 775.21(4)(a)2}*

AND

- A conviction of a felony or similar law of another jurisdiction that is a qualifying offense has not been set aside in any post conviction proceeding; *{Section 775.21(4)(a)3}*

AND

- In order to be counted as a prior felony for purposes of this subsection, the felony must have resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense and sentenced or

adjudicated separately from any other felony conviction that is to be counted as a prior felony. If the offender's prior enumerated felony was committed more than 10 years before the primary offense, it shall not be considered a prior felony under this subsection if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later.

{Section 775.21(4)(b)}

794.065 Unlawful place of residence for persons convicted of certain sex offenses.--

(1) It is unlawful for any person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, or s. 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, to reside within 1,000 feet of any school, day care center, park, or playground. A person who violates this section and whose conviction under s. 794.011, s. 800.04, s. 827.071, or s. 847.0145 was classified as a felony of the first degree or higher commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083. A person who violates this section and whose conviction under s. 794.011, s. 800.04, s. 827.071, or s. 847.0145 was classified as a felony of the second or third degree commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

947.1405 Conditional release program.--

(7)(a) Any inmate who is convicted of a crime committed on or after October 1, 1995, or who has been previously convicted of a crime committed on or after October 1, 1995, in violation of chapter 794, s. 800.04, s. 827.071, or s. 847.0145, and is subject to conditional release supervision, shall have, in addition to any other conditions imposed, the following special conditions imposed by the commission:

1. A mandatory curfew from 10 p.m. to 6 a.m. The commission may designate another 8-hour period if the offender's employment precludes the above specified time, and such alternative is recommended by the Department of Corrections. If the commission determines that imposing a curfew would endanger the victim, the commission may consider alternative sanctions.

2. If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate. A releasee who is subject to this subparagraph may not relocate to a residence that is within 1,000 feet of a public school bus stop. Beginning October 1, 2004, the commission or the department may not approve a residence that is located within 1,000 feet of a school, day care center, park, playground, designated school bus stop, or other place where children regularly congregate for any releasee who is subject to this subparagraph. On October 1, 2004, the department shall notify each affected school district of the location of the residence of a releasee 30 days prior to release and thereafter, if the releasee relocates to a new residence, shall notify any affected school district of the residence of the releasee within 30 days after relocation. If, on October 1, 2004, any public school bus stop is located within 1,000 feet of the existing residence of such releasee, the district school board shall relocate that school bus stop. Beginning October 1, 2004, a district school board may not establish or relocate a public school bus stop within 1,000 feet of the residence of a releasee who is subject to this subparagraph. The failure of the district school board to comply with this subparagraph shall not result in a violation of conditional release supervision.

3. Active participation in and successful completion of a sex offender treatment program with therapists specifically trained to treat sex offenders, at the releasee's own expense. If a specially trained therapist is not available within a 50-mile radius of the releasee's residence, the offender shall participate in other appropriate therapy.

4. A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the victim, the offender's therapist, and the sentencing court.

5. If the victim was under the age of 18, a prohibition against direct contact or association with children under the age of 18 until all of the following conditions are met:

a. Successful completion of a sex offender treatment program.

b. The adult person who is legally responsible for the welfare of the child has been advised of the nature of the crime.

c. Such adult person is present during all contact or association with the child.

d. Such adult person has been approved by the commission.

6. If the victim was under age 18, a prohibition on working for pay or as a volunteer at any school, day care center, park, playground, or other place where children regularly congregate, as prescribed by the commission.

7. Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

8. A requirement that the releasee must submit two specimens of blood to the Florida Department of Law Enforcement to be registered with the DNA database.

9. A requirement that the releasee make restitution to the victim, as determined by the sentencing court or the commission, for all necessary medical and related professional services relating to physical, psychiatric, and psychological care.

10. Submission to a warrantless search by the community control or probation officer of the probationer's or community controllee's person, residence, or vehicle.

Electronic Monitoring: Description and Costs

Prepared by staff of the Florida House of Representatives

The Department of Corrections (DOC) uses three different types of electronic monitoring of offenders on community supervision. The primary differentiation between electronic monitoring approaches is whether or not it uses radio frequency (RF) technology or GPS technology. GPS-based electronic monitoring is further divided into active GPS monitoring and passive GPS monitoring. All varieties of electronic monitoring require the offender to wear an electronic device on his or her body.[1]

Electronic monitoring costs vary depending on the type of monitoring employed (See Table 1 attached). Active GPS is the most expensive, and radio frequency the least expensive.[2] For FY 2005-06, the Legislature has appropriated $7.39M for electronic monitoring. Approximately $3.2M of this amount was funded through the Jessica Lunsford Act.

Radio frequency monitoring

This form of monitoring provides essentially a curfew check to verify whether an offender is within an area to which he or she has been restricted. Most commonly, RF monitoring is used to determine whether an offender is in the home. The offender must wear a transmitter that transmits a radio signal to a small receiving unit. The transmitter is attached to the offender with a strap that has the capability of providing tamper alert notification. The broadcast range of the transmitter may be adjusted depending upon individual circumstances. The receiving unit is linked to a telephone line. If the receiving unit does not receive the radio signal from the transmitter at the appropriate time, it causes an alert to be sent to the data center. In turn, the data center notifies the probation officer of the alarm RF monitoring systems can be programmed to account for periods when the offender is permitted to be away from the restricted area, such as to go to work or to attend religious services. However, RF monitoring does not provide any information about the offender's location when the offender moves outside the range at which the receiver can detect the radio transmission.

> Cost: Radio frequency (RF), the least expensive monitoring technology, is $1.97 per unit per diem, for an annual cost of $719.05 per unit.

Passive GPS monitoring

This form of monitoring requires the monitored offender to wear a small radio transmitter on his or her body and to wear or carry a device that includes a radio receiver, a GPS receiver, and a storage unit. The transmitter and receiver combination ensures that the offender remains close to the GPS receiver. As is the case with RF monitoring systems, the transmitter is attached to the offender with a strap that has the capability of providing tamper alert notification.

It detects the offender's movements as he or she moves about. The device can record that the offender left an area and can pinpoint the offender's location during the day. Because the defendant's location can be accurately determined, the system parameters can be set to determine that the offender entered an area from which he or she is legally excluded, such as when a sex offender goes within 1000 feet of a school.

The system is referred to as passive because it records the information for later examination by the probation officer. At the end of a specified interval, normally daily, the offender must download the

---

[1] Information regarding DOC's use of electronic monitoring was obtained from a interim report of the Senate Criminal Justice Committee (2005-126) released in November 2004 entitled, Global Positioning System (GPS) Technology Use in Monitoring the Activities of Probationers.

[2] The per diem unit costs presented here does not include the cost to have probation officers monitor the devices and respond to alerts. However, since probation officers must supervise offenders whether monitored or not, some might consider this to not be an additional expense.

information from the GPS receiver to another device. Depending on the sophistication of the system, the information can either be sent to the data center by telephone or stored for future retrieval. When the data is compared against a set of known locations, such as a map with GPS coordinates, an analyst can determine where the offender was at any particular time.

Cost: Passive GPS per unit is $4.25 per diem for an annual cost of $1,551.25 per unit. These devices create more workload for officers.

Active GPS monitoring

This form of monitoring uses the same basic technology as passive GPS monitoring, but provides near real-time reporting of the offender's location. Active GPS monitoring incorporates a cell phone into the equipment in order to transmit the offender's location coordinates to a data center. The system is designed to provide an alert to the probation officer when the offender either leaves an area to which he or she is restricted or enters an area from which he or she is barred.
For either type of GPS monitoring system, the department or its contractor maintains an archive of the GPS data points (locations) of offenders on either type of GPS monitoring. Therefore, a law enforcement agency can request a search of the database to determine whether a monitored offender was in the area when a crime was committed.

Cost: This is the most expensive type of monitoring because of the additional expense for cell phone service and 24-hour monitoring.

Currently, all active GPS devices are provided by ProTech at a per diem $8.97 per unit, for an annual cost per unit of $3,274.05. As a result of the requirements of the Jessica Lunsford Act,[3] the Department of Corrections has entered into two new contracts for supplying active GPS devices, with each vendor supplying units in approximately one-half of the state, as follows:

South Florida (I-Secure): per unit per diem is $6.94, for an annual cost per unit of $2,533.10

North Florida (G4S): per unit per diem is $6.47 for an annual cost per unit of $2,361.55.

The Department plans to move only two offenders using the Pro-Tech unit to the new I-Secure contract. All other offenders currently using the ProTech unit will stay with ProTech.

[3] Because of the Jessica Lunsford Act, the Department of Corrections is required to electronically monitor those offenders under community supervision who have committed a specified sexual offense or have been designated as a sexual predator. The act also requires lifetime electronic monitoring of offenders who meet certain criteria. The Act applies to those committing offenses subsequent to the Act becoming law (September 1, 2005)

Table 1. Estimated additional cost to place under active or passive GPS monitoring those offender populations that are on community supervision but not currently subject to these types of monitoring. [*Prepared by staff of the House Judiciary Committee (12/6/05)*]

Offender population	Number units needed[1]		Estimated cost	
	Passive GPS	Active GPS	Passive GPS	Active GPS[2]
All sexual offenses (adult and child victims)	6737	6751	$10.5M	$16.5M
Sexual battery, sexual violence, plus lewd and lascivious (adult and child victims)	5958	5971	$9.2M	$14.6M
Sexual battery, sexual violence only (adult and child victims)	3007	3013	$4.7M	$7.4M
Sexual battery, sexual violence, plus lewd and lascivious (child victim)	5322	5334	$8.3M	$13.1M
Sexual battery, sexual violence only (child victim)	2399	2404	$3.7M	$5.9M

Note: For FY 2005-06, the Legislature appropriated $7.39M for electronic monitoring for all offender populations, both sexual and non-sexual.

[1] Based on numbers included in OPPAGA presentation to the House Judiciary Committee on 12/7/05. Using the latest numbers from the Department of Corrections should result in fewer units needed and therefore less cost.

[2] The cost is calculated using a unit cost of $6.71, the result of averaging the unit cost for North Florida and South Florida under two recent Department of Corrections' contracts with vendors.

Proposed by Orange County

Proposed Preemption Provision

- Suggested language

Amend Section 794.065, F.S. by adding a new subsection 3 as follows:

"In order to make the application and enforcement of Section 794.065 uniform throughout the State of Florida, it is the intent of the legislature to preempt the field, to the exclusion of counties and municipalities. To that end, it is hereby declared that every county ordinance and every municipal ordinance adopted prior to [*the effective date of this statutory amendment*] shall stand abrogated and unenforceable on and after such date, and that no county, municipality, or consolidated county-municipal government shall have the power to adopt any ordinance relating to the subject of this section on or after [*the effective date of this statutory amendment*]."

hlt